82-1571

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST ALABAMA BANK OF MONTGOMERY, N.A.,
Petitioner,

vs.

CHARLOTTE KYLE MARTIN, KATHLEEN GERSON
GLORIA McKEON, and VIRGINIA G. WELDON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW[1]

The named beneficiaries of four trusts which held participating units in two common trust funds were permitted to bring a state class action against the common fund trustee—a national banking association—on behalf of all beneficiaries of some 1,250 trusts which had participating units in these common funds from 1971 through 1978, and to question the prudence of certain common fund investments. Judgment was entered against the trustee for $2,600,000 in money damages consisting of the difference between the acquisition and sales prices of questioned securities. Interest on this sum was compounded. The state's highest court did not require any notice of this state class action proceeding to be given to any putative class members, and none was given.

1. Does this decision of that court violate the Fourteenth Amendment due process guaranties of the beneficiaries of these 1,250 participating trusts and of the trustee, in conflict with holdings of this Court and of federal courts of appeal; and for this reason, should the state class action proceeding be dismissed?

2. Does due process guarantee to the trustee of these 1,250 trusts the right to judicial accountings to ascertain the financial impact, if any, of these common fund investments on the individual trusts?

3. Is the judgment below impermissible state judicial interference with a national bank?

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[1] The parties to the proceedings in the Supreme Court of Alabama were Petitioner, First Alabama Bank of Montgomery, N.A. (hereinafter "Bank"), a national banking association, and Respondents, Martin, Gerson, McKeon and Weldon, who sued on their own behalf and on behalf of all beneficiaries of trusts, under which Petitioner (hereafter "Bank") was trustee, a portion of the corpus of which was invested in two common trusts funds—a bond fund and an equity fund—during the period 1971 through 1978.

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No.

In The

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First Alabama Bank Of Montgomery, N.A.,
Petitioner,

vs.

Charlotte Kyle Martin, Kathleen Gerson
Gloria McKeon, and Virginia G. Weldon,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Alabama entered in these proceedings on August 20, 1982 and January 14, 1983.

OPINION BELOW

The opinion of the Supreme Court of Alabama of August 20, 1982, is unreported and appears as Appendix A; the order of that Court of January 14, 1983, which modified and extended its original opinion, overruled Petitioner's application for rehearing and granted Respondents' application for rehearing is unreported and appears as Appendix B; its order staying judgment pending proceedings on Certiorari here appears as Appendix C; its opinion dismissing an earlier petition for interlocutory

review is reported at 381 So.2d 32 and appears as Appendix D; the judgment of the trial court of August 19, 1981, appears as Appendix E; its order of June 24, 1981 regarding the prudence of certain investments appears as Appendix F; and its order on class action determination of July 26, 1979 appears as Appendix G.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 20, 1982; its judgment of January 14, 1983, extending and modifying its opinion of August 20, 1982 and denying Petitioner's and granting Respondents' application for rehearing was entered on January 14, 1983. This Petition for Certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment Fourteen:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction to equal protection of the laws."

Rule 23, Alabama Rules of Civil Procedure appears in Appendix H.

STATEMENT OF THE CASE

Respondents brought this action as a class action[2] in the Circuit Court of Montgomery County, Alabama on behalf of the more than 1250 beneficiaries of trusts, under which Petitioner, a national banking association (hereinafter "Bank") was trustee, a portion of the corpus of which had been invested in two so-called common trust funds of which Bank was also trustee—a bond fund and an equity fund; and asserted losses alleged to have arisen out of certain alleged imprudent investments in the two common funds. The common trust fund device is authorized

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[2] Alabama's class action Rule 23, and subparts, are identical to those of Rule 23 of the Federal Rules of Civil Procedure. *First Baptist Church* v. *Citronelle-Mobile Gathering, Inc.*, 409 So.2d 727 (Ala. 1981). Respondents first sought class action certification under all subdivisions of rule 23, but amended to proceed only under Rule 23(b)(1)(A) and (B) and 23 (b)(2), Alabama Rules of Civil Procedure. The trial court, over Bank's objection, so certified the class action on July 26, 1979, but certified, as well, an interlocutory appeal to the Supreme Court of Alabama, the court below, pursuant to Rule 5 of the Alabama Rules of Appellate Procedure, which is akin to 28 U.S.C. § 1292(b). The court below, however, declined to accept this interlocutory appeal because the trial court's class action order was "inherently provisional" and thus did not involve "controlling questions of law." *First Alabama Bank of Montgomery, N.A.* v. *Martin*, 381 So.2d 32, 35 (Ala. 1980). As will more fully appear, Bank raised before the trial court in pleadings; at the hearing on class action certification; in the court below on brief in support of its attempted interlocutory appeal (pp. 45 and 46); and in its brief and argument in the court below on appeal from the final order of the trial court, the question presented for review here, namely, that the trial court and the court below violated due process guaranties when they permitted this class action—seeking predominantly enormous money damages—to proceed to conclusion without any notice whatever to the beneficiaries of the more than 1250 trusts comprised in the putative class action. The contrary holdings of this Court in *Mullane* v. *Central Hanover Bank*, 339 U.S. 306 and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, were cited to the trial court and the court below in support of Bank's contentions.

by regulation of the Comptroller of the Currency and legislation in many states, including Alabama, § 5-12A, et seq., Alabama Code 1975, in order that donors or testators of moderately sized trusts may obtain the benefits of broader planning, diversification of risk, economy of management and the sharing of income, capital gains, losses and expenses which are available to a trust with a larger investment portfolio. If Bank, as trustee of an individual trust, elects to invest in such a common trust fund, it purchases participating units in the common trust fund, just as, if so authorized and desired, it might purchase shares in any number of mutual investment funds, e.g. Massachusetts Investors Trust, or shares of stock in a corporation, e.g. General Motors. Bank acts, literally, as an investment company.[3] The action below sought to draw in question the prudence of certain investments made by Bank in the common bond and equity funds during the period 1971 through 1978.[4]

The class certified by the court below encompasses more than 1,250 trusts of which Bank acted as trustee and 15 as executor. Bank acted as co-trustee with more than 131 other trustees in the administration of these trusts, and as co-executor with 6 other persons; and acted under the investment control of at least 140 other persons. There are more than 1,800 known trust beneficiaries;[5] and approximately 2,500 known beneficiaries of

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[3] *Federal Reserve System* v. *Investment Company Institute,* 450 U.S. 46, 55-56:

> "These common trust funds administered by banks would be regulated as investment companies . . . . were they not exempted . . . ."

[4] As will more fully appear, 91% of the questioned investment transactions occurred prior to December 31, 1974. (R. II, 2687)

[5] There undoubtedly are unknown beneficiaries (regardless of investigation); minors; incompetents; known beneficiaries (but identifiable only through the monumental burdens of identifying persons described in trust instruments as e.g., "spouse", "child", "next of kin", "heir", "brother or sister" or other relative etc.).

pension or profit sharing trusts. The known beneficiaries of these several and varied trusts are residents of 23 states, the District of Columbia and Puerto Rico. Measurement of trust investment performance involves a detailed reconstruction of the financial history of each trust—an exercise which requires approximately 1,250 separate accounting procedures.

After the trial court's dismissal of its interlocutory challenge to the class action certification which had urged, among other things, that a class action would be wholly unmanageable because more than 1250 separate accountings would be required, Bank—faced with such a class action—then filed a counterclaim seeking such an accounting. Bank asserted that a denial of its constitutional right to secure such an accounting would deprive it of property without due process of law and deny equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.[6]

The trial court struck the counterclaim "without prejudice to the rights of [Bank] to file and prosecute separate actions requesting the same relief." (R.II, 155) The court below, noting Bank's insistence that the dismissal of its counterclaim for an accounting violated its asserted constitutional guaranties, summarily disposed of these constitutional issues with the observation that the trial court "had the discretion to make necessary orders for the efficient disposition of class actions [and] ob-

[6] (R. 172-176) The counterclaim also sought, among other things, a prompt identification of class members and a direction of notice to them; the appointment of guardians or guardians ad litem to protect the interests of minors, unborn, incapacitated, contingent and uncertain beneficiaries; and an accounting in the form of a judicial determination of the permissibility of the investments made by Bank as trustee of trusts of which the named plaintiffs and all class members were beneficiaries during the period in question.

viously felt that to allow the counterclaim would make the class *unmanageable.*" (Emphasis supplied; App. A, Ms. 16).

Bank had argued to the court below that the named plaintiffs (Respondents here) could obtain complete relief in orderly and traditional accounting proceedings in which they could complain, among other things, that none of the their trust funds should have been invested in the bond or equity fund. And, Bank earlier attempted to show these courts that the putative class action was predominantly, if not exclusively for money damages, and should proceed, if at all, under the requirements of Rule 23(b)(3), Alabama Rules of Civil Procedure.

The proceedings below demonstrated that Bank's analysis was correct. The trial court, after receiving a majority advisory verdict from a jury, decided that the purchase or sale of certain designated bond and equity fund securities had been imprudent; ordered Bank to pay $1,226,798 into the bond fund and $1,426,254.88 into the equity fund—the difference between the purchase and sales prices of specified bond and equity securities; and ordered Bank to pay compound interest on these sums from the date of sale at the highest Treasury Bill rate. The Supreme Court of Alabama below, after rehearing, affirmed. Moreover, the trial court's order of August 20, 1981, affirmed without elaboration by the Supreme Court of Alabama, directed Bank to "recalculate and restate each quarterly valuation of principal [in the bond and equity funds] as if [the securities held to have been imprudently acquired or sold] had neither been purchased nor sold;" and Bank was further ordered to distribute promptly to "the owners of participating units, including those participating units previously withdrawn, any principal amounts due on the basis of such restated quarterly statements." (R. II 1315, ¶ 9)

The courts below thus ordered a distribution of money damages to the class members without any direction whatever as

to how these damages should be computed, let alone related to any actual injury which any "owner" may have suffered.[7]

[7] Trusts which hold participating units in the common funds may purchase or sell them only at quarterly valuation dates. Income is distributed per participating unit on a quarterly basis. The value of the participating units varies from day to to day in proportion to the variation in the valuation of all assets held by the two common funds. Thus there is an enormous variation in the investment experience of each individual trust which invests in the common funds—a variation which depends upon the purchase and sales dates of participating units, and their valuations at these times.

Respondent Gerson's trusts had a gain in equity fund units; purchased bond fund units at nine separate times at nine different prices; and sold them on nine occasions at different prices. These prices differed also from the purchase and sales prices for the other three respondents. (R. 575-584)

Only two respondents testified and neither was able to relate any investment experience in the bond and equity funds to any alleged imprudent investment of assets of those funds. (R. II, 1591-96; 1606; 1611; and 1621) Respondents conceded that if the distribution order below is "divided among the present holders of participating units, such beneficiaries would receive an unjustified windfall profit, while others whose funds had actually been lost but who had withdrawn before the recovery would not participate in the recovery." (Brief of Respondents below, pp. 83 and 21) Plainly, the impact of Bank's performance as common fund trustee on the individual trusts of the class members cannot be measured without a detailed reconstruction of the financial history of each trust—an exercise which requires approximately 1250 separate accounting procedures. This is why, indeed, no other court has ever permitted a class action such as the one certified below. *Schaffner* v. *Chemical Bank,* 339 F. Supp. 329, 334-336 (S.D.N.Y. 1972), is precisely in point:

> "To the factual and legal complexities presented by the issues of liability in each trust must be added the further variations in issues of damages. The theories on which plaintiff seeks damages for all members of her class will require the minute examination of the transactions undertaken in each portfolio."

This award of monetary damages to individual class members—if the judgment below stands—should be binding on them, and foreclose any subsequent action based on matters which were, or could have been litigated in this action.[8] The result would be that class members, who have never been accorded their due process rights to notice, are so affected; or, if they are not so bound, then Bank has suffered a serious and manifest injustice of constitutional proportions. But, as already noted, the courts below certified and tried a class action without notice to the beneficiaries of the more than 1250 trusts which invested in the bond and equity funds from 1971 through 1978, thus depriving them of an opportunity to opt-out or to be represented by counsel of their choice. This omission squarely violates the due process guaranties enunciated by this Court in *Mullane* v. *Central Bank*, 339 U.S. 306 and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173.[9]

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[8] *Century 21* v. *Alabama Real Estate Com.*, 401 So.2d 764 (Ala. 1981).

[9] Bank has a "direct and personal interest in the outcome" of the issue of whether the judgment below binds more than 1,000 unnotified trust beneficiaries. Thus Bank has clear standing to seek review of that question here. *Hanson* v. *Denckla*, 357 U.S. 235, 244-45; *Chicago* v. *A.T. & S. F. R. Co.*, 357 U.S. 77, 83.

Bank repeatedly raised this constitutional error below and insisted that the notice to class members required by the constitutional guarantees of due process cannot be avoided by the attempted legerdemain by transforming a 23(b)(3) case into a 23(b)(1) or (2) case. For example, counsel for Bank argued to the trial court (R. 1398):

> "We heard, ... that the Court can now ignore notice because the plaintiffs have decided that they can amend their Complaint and drop a claim that this is a class action under Rule 23(b)(3), and, therefore, not have to give any notice. This isn't correct. The Supreme Court of the United States in *Mulane* v. *Central Hanover Bank* in 339 U.S., which is cited and quoted extensively in the leading *Eisen* v. *Carlisle and Jacquelin* case has held that they can't, ... that personal notice to all those who can reasonably be ascertained has to be given. This is a matter of due process under the Constitution of the United States...."

Although this Court there made plain that in proceedings which questioned common fund investments, due process mandated this notice to beneficiaries of trusts which had invested in participating units of these common funds, the Supreme Court of Alabama below held that such notice could be avoided at a state trial judge's discretion:

> "First Alabama states that the trial court, by certifying the class under Rule 23(b)(1) and (b)(2), without giving notice to the beneficiaries involved, deprived those beneficiaries of the opportunity to opt-out or to be represented by counsel of their choice, thereby violating the due process guarantees of *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), and *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). The appellants further contend that the plaintiffs are seeking primarily money damages and that it was error to allow them to proceed under Rule 23(b)(1) and (b)(2) instead of Rule 23(b)(3). We do not agree.
>
> "Neither *Eisen* nor *Mullane* dealt with notice under Rule 23(b)(1) or (b)(2). In fact, Rule 23(c) provides that notice is required *only* in class actions certified under Rule 23(b)(3). Rule 23(b)(1) and (b)(2) class actions have been held not to require notice." (Emphasis by the Court)[10]

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[10] App. A, Ms. 14.

REASONS FOR GRANTING THE WRIT

1. The Alabama Court Of Last Resort Has Decided A Federal Constitutional Question In A Way Which Conflicts With The Decisions Of This Court In Mullane v. Central Hanover Bank, 339 U.S. 306 And Eisen v. Carlisle & Jacquelin, 417 U.S. 156.[11]

Mullane held that a New York bank, in the course of a statutory accounting for its investments in common funds, must send individual notice to all beneficiaries of trusts which had invested in participating units of the common funds whose names and addresses could be ascertained through reasonable effort. This Court there, and in the later case of *Eisen* v. *Carlisle and Jacquelin,* 417 U.S. 156, 173, made it plain that this notice to beneficiaries could not be withdrawn at a trial judge's discretion; it is mandated by due process guaranties.

The notice requirement of *Mullane,* in a class action which seeks money damages because of alleged imprudent investments by a common fund trustee, is a due process guaranty. The constitutional mandate of notice cannot be avoided by a shifting of state class action labels. *A fortiori,* state courts may not deny constitutional rights in order to make an "unmanageable" class action manageable. In the venerable words of Justice Frankfurter, the Constitution of the United States "nullifies sophisticated as well as simple minded modes of discrimination."[12]

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[11] This is a classic and strong reason for the grant of certiorari. Rule 17.1(c) of the Rules of this Court; *William E. Arnold Co.* v. *Carpenters District Council,* 417 U.S. 12, 14 ("We granted certiorari to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court..."); *Pittsburg* v. *Alco Parking Corp.,* 417 U.S. 369, 371-2 ("Because the decision appeared to be in conflict with the applicable decisions of this Court, we granted certiorari and we now reverse the judgment.")

[12] *Lane* v. *Wilson,* 307 U.S. 268, 275.

Indeed, as this Court taught in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 173-74, the *Mullane* decision was the constitutional reason for the 1966 revision of the federal class action rules so as to require notice in cases substantively similar to *Mullane*:

> "The Advisory Committee's Note to Rule 23 reinforces this conclusion. See 39 FRD 69, 98 (1966). The Advisory Committee described subdivision (c)(2) as 'not merely discretionary' and added that the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.' Id. at 106-107. The Committee explicated its incorporation of due process standards by citation to Mullane v. Central Hanover Bank & Trust Co., (Cit.) and like cases.
>
> "In Mullane the Court addressed the constitutional sufficiency of publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement of accounts. The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process."

The impact of the constitutional error below is enormous and pervasive. Either unnamed class members who have never received notice are bound by the judgment below under principles of *res judicata;* or Bank, required to pay millions, will have secured *res judicata* protection only as to the four named plaintiffs.[13]

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[13] As will be noted, at least three federal courts of appeals have held that, regardless of label, where monetary damages are sought and made available in a class action, notice is *not discretionary but required,* and an individual class member's later suit for damages will not be barred by *res judicata* if notice in the class action is inadequate, let alone nonexistent. *Johnson* v. *General Motors Corp.*, 598 F.2d

Regardless of labels, there can be no serious question that the class action below sought primarily money damages; and the judgments below order payment of money damages, albeit unable to specify recipients, or amounts, or to relate damages to any injury suffered.

The rationale of the distinction between (b)(1) and (b)(2) cases - where notice is not required and there is no right to opt-out - and (b)(3) cases where there must be notice and right to opt-out, reflects distinctions, with obvious due process overtones, based upon the degree of cohesiveness or unity of the claims, and, conversely, the absence of disparity, separateness or conflict among claims. If one will be affected by an adjudication regardless of whether one opts-out of the class litigation - the (b)(1) or (b)(2) type class action - then due process does not require notice and an opportunity to remove ones self from litigation in order to avoid its binding, *res judicata,* effect. In contrast, however, when the recovery of money damages is sought, relief may be awarded in a manner which distinguishes among individual class members, and these members, therefore, have a right to notice and to exclude themselves from a lawsuit. See, *Penson* v. *Terminal Transport Co.*, 634 F.2d 989, 993-4 (5th Cir. 1981) and authorities there cited.

The judgment below erred as a matter of constitutional law in permitting this class action to proceed to judgment without notice to the individual class members, in square conflict with the mandates of due process as enunciated by this Court in *Mullane* v. *Central Hanover Bank,* 339 U.S. 306 and *Eisen* v.

432, 438 (5th Cir. 1979); *Penson* v. *Terminal Transport Corp.*, 634 F.2d 989, 994-995 (5th Cir. 1981); and *Crowder* v. *Lash,* 687 F.2d 996, 1008 (7th Cir. 1982). The Eleventh Circuit has adopted as its law all relevant holdings of the Fifth Circuit. *Bonner* v. *City of Prichard,* 661 F.2d 1206 (11th Cir. 1981).

Carlisle & Jacquelin, 417 U.S. 156. This failure to give notice requires, as in *Eisen*, 417 U.S. at 179, a dismissal of the class action.[14]

2. Federal Courts Of Appeals Have Decided A Federal Constitutional Question In A Way In Conflict With The Decision Of The Supreme Court Of Alabama Below.[15]

The Fifth Circuit in *Johnson* v. *General Motors Corp.*, 598 F.2d 432, 438 (1979), held that even in a 23(b)(2) action, when both monetary and injunctive relief are sought, notice is mandatory if absent class members are to be bound. Citing[16] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 at 474 and *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, it held:

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[14] Notice now cannot cure this constitutional infirmity. Although this attempted class action covers the period 1971-78, only investments in 30 specified securities have been questioned; and 91% of these investment transactions occurred before December 31, 1974 (R. II, 2687). Yet the judgment below purports to bind *all beneficiaries* of trusts which bought participating units in the common funds as to *all investment transactions* (including acquisitions of the participating units themselves) from 1971 through 1978—without any notice; and without an opportunity to get out of the class action, or to be represented by other counsel, or to question other transactions, or to assert any financial injury to themselves. Conversely, if these more than 1,250 unnotified beneficiaries are not so bound, the Bank will have been required to pay several millions of dollars in damages to bind only the four named plaintiffs who have not even sought to prove measurable financial damages to them resulting from the questioned common fund transactions.

[15] This is an established reason for review on certiorari. Rule 17.1(b) of the rules of this Court; *Katzinger* v. *Chicago Metallic Corp.*, 329 U.S. 394, 398 ("We granted certiorari because of a conflicting decision [between the Pennsylvania Supreme Court and the Seventh Circuit Court of Appeals]"); *MacGregor* v. *Westinghouse Co.* 329 U.S. 402.

[16] Cited *passim*. For example (598 F.2d at 436):

> "In *Eisen*, the Supreme Court endorsed the Advisory Committee's position that the notice provisions of Rule 23 must be interpreted so as to bring the conduct of class litigation within the minimum requisites of due process. 417 U.S. 173-75."

> "Before an absent class member may be forever barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it."

In *Penson* v. *Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981), the court held that "where monetary relief is sought and is made available in a Rule 23(b)(2) class action, notice is no longer discretionary but is *required* at some stage in the proceedings. *Johnson* v. *General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979)." (Emphasis by the Court) It elaborated (634 F.2d at 995):

> "This Court has consistently held that a class member's individual suit will not be barred by *res judicata* if notice of the prior judgment in the class action is inadequate. (Cit.) Since the notice ... that was mailed to Penson was inadequate, Penson's present action is not barred by *res judicata.*"

The Seventh Circuit in *Crowder* v. *Lash*, 687 F.2d 996, 1008 (1982) agreed with the Fifth Circuit holdings that "before a class member may be barred from pursuing an individual claim for damages, he must have been notified that he was required to adjudicate his damage claims as part of a prior class action suit."[17]

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[17] The decision below likewise is in conflict with the Seventh Circuit's decision in *Simer* v. *Rios*, 661 F.2d 655 (7th Cir. 1981), that notice to class members of settlement is "necessary as a matter of constitutional due process" since "an individual's claim cannot be extinguished without notice and an opportunity to be heard," citing *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, 313-14. (611 F.2d at 664) Such notice is constitutionally required, the court held, even though the settlement judgment does not bind the absent putative class members, since "the practical effect of the settlement was to distribute the $18 million dollar fund ... in a manner that may have been contrary to the interests of putative class members." *Id.* at 666-67.

The judment of the Supreme Court of Alabama squarely conflicts with the decisions of these federal courts of appeal when it holds that due process under the federal constitution does not require notice to these numerous class members in a class action which seeks to adjudicate their rights to money damages.

Moreover, the judgment of the Supreme Court of Alabama has really permitted a "fluid class action recovery", and thus conflicts as well with the decisions of the Second, Fourth and Ninth Circuits that such a procedure also violates the constitutional requirement of due process. *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2nd Cir. 1973);[18] *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977);[19] and *In Re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974).[20]

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[18] "Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold that 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."

[19] "Nor, as the district judge held, can the difficulties inherent in proving individual damages be avoided by the use of a form of 'fluid recovery.' Such a method of computing damages in a class action has been appropriately branded as 'illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.' " (Citing *Eisen*, 479 F.2d at 1018)

[20] "We agree with the decision reached in [Eisen] that allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes. Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to Promulgate the Federal Rules of Civil Procedure."

3. The Decision Below Conflicts With Decisions Of Other State Courts Of Last Resort In The Determination Of A Fundamental And Important Constitutional Question.

Other state courts, relying primarily on *Mullane* and *Eisen*, hold that due process mandates notice to absent class members regardless of technical labels affixed to class actions or of state procedural requirements. *Frankel* v. *City of Miami Beach*, 340 So.2d 463, 469-70 (Fla. 1977); *National Lake Development, Inc.* v. *Lake Tippecanoe Owners Ass'n*, 417 So.2d 655, 657 (Fla. 1982); *Williams* v. *State of Louisiana*, 350 So.2d 131, 137-38 (La. 1977); *Frank* v. *Teachers Insurance & Annuity Ass'n.*, 71 Ill.2d 583, 376 N.E.2d 1377, 1382 (1978);[21] *Grigg* v. *Michigan Nat'l Bank*, 72 Mich. App. 358, 249 N.W.2d 701 (1976).

The decision below also conflicts with the Uniform Class Actions Act, Sec. 7(d), approved in 1976 by the National Conference of Commissioners on Uniform State Laws, which requires that the detailed notice specified in its § 7(b) "*shall* be given" by personal or mailed service to "[e]ach member of the class . . . whose monetary recovery or liability is estimated to exceed $100."

There is a clear danger that class action judgments rendered without notice to individual class members in Alabama and other states which might adopt its view will have no binding *res judicata* effect in the federal and state courts which require such notice as a matter of constitutional guarantee. Any of the thousands of beneficiaries of the 1,250 trusts involved in the action below appear to be free to institute similar suits seeking additional damages in the federal or state courts of the 23 states in which they reside. These undesirable consequences flow directly from the decision below; and only this Court can prevent them.

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[21] The class relief sought in the Illinois case was not monetary damages but the reformation of retirement annuity contracts to include a cash-surrender provision.

The issue here presented is also of major practical importance. As of January 1, 1982, 32 states, like Alabama, had adopted class action procedures patterned after the 1966 Federal Rule 23.[22] If the decision below stands unreviewed, the courts of these states will surely be tempted to follow Alabama and hold, erroneously, that the burden of notice to class members in actions which seek money damages may be eliminated by the simple label of 23(b)(1) or (2). Only this Court can avoid this unfortunate—and unconstitutional—result by an authoritative reassertion now of its decisions in *Eisen* and *Mullane* that due process does indeed require notice to class members in class actions for money damages.

4. **The Judgment Below, Which Deprived Bank Of Its Well Established And Constitutionally Protected Right To Insist Upon An Accounting Of Its Trust Investment Activities Because Such Accounting "Would Make The Class Unmanageable", Is A Stark Departure From Elemental Concepts Of Due Process Law.**

The court below denied Bank its well established right to insist upon an accounting, not only with respect to those matters drawn in question by the beneficiaries, but as to its entire administration of each trust. III *Scott on Trusts,* 3 Ed., § 260, pp. 2217-18; *Restatement 2d of Trusts,* § 260. In the circumstances of this case the court below deprived Bank of its property without due process of law and denied it equal protection of the laws in violation of Fourteenth Amendment guaranties.

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[22] Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming. *Newberg on Class Actions,* § 1210(b), Supp.

When one's property interests are at stake "[t]he fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner' ". *Parratt* v. *Taylor,* 451 U.S. 527, 540 citing *Armstrong* v. *Manzo,* 380 U.S. 545, 552.

An accurate and fair assesment of liability and damages is impossible without an analysis of the investment experiences of each trust which invested in the common funds and of the financial impact on each such trust of the common fund transactions drawn in question. The court below simply exacerbates the constitutional violation when it attempts to explain that such accountings are presently "unmanageable" but may be brought later in "individual actions" after the conclusion of this long, expensive and complex litigation.

5. The impact of the judgment below is grave and of national concern, whether or not it becomes precedent in the highest courts of states outside Alabama. Bank is a national banking association. Nevertheless, it is confined to the state courts in a putative class action such as this. And so are its national banking counterparts in all other states.

This Court in *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555, 558-9, restated traditional teachings of more than a century:

> "National banks are federal instrumentalities and the power of Congress over them is extensive. 'National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit.' Van Reed v. Peoples Nat. Bank, 198 U.S. 554...."

It is essential, therefore, that this Court protect this national bank—and all others—from the interference of state judicial action in the form of state class action procedures which would be clearly impermissible under the federal rules, let alone if judged by due process standards.[23]

Congress did not intent such interference with the operations of national banks when, in the last century, it withdrew their right to invoke the jurisdiction of federal courts simply because they were created by and exercised their powers under acts of Congress. Moreover, Congress and national banks properly must look to this Court for protection against this impermissible interference. The occasion for this Court's review of this state judicial action is at hand.

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[23] *Eisen*, 417 U.S. at 173 and *Mullane*. See also authorities cited in section 2, *supra*.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE STATE OF ALABAMA — — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1982

80-853

First Alabama Bank of Montgomery, N.A.

v.

Charlotte Kyle Martin, Kathleen Gerson, Gloria Alleta Parker, and Virginia G. Weldon

Appeal from Montgomery Circuit Court

TORBERT, CHIEF JUSTICE.

This is a class action. The plaintiffs are beneficiaries of approximately 1,250 individual trusts, of which the bank is trustee. As trustee of these individual trusts, the bank invested certain assets comprising the principal of those trusts in participating units of two common trusts funds, a bond fund and an equity fund.

After First Alabama purchased and sold certain units and made certain investments that resulted in substantial losses to those funds, the plaintiffs sought a declaration as to the duty of the bank and its liability to account, a declaration that certain investments were imprudent, and affirmative relief requiring the bank to restore to the common trust funds the losses sustained because of the bank's allegedly improper investments.

Prior to the certification of the class, First Alabama took the position that this action would require a full accounting of each

of approximately 1,250 individual trusts. The trial court did not agree. After the original appeal to this Court,[1] First Alabama filed a delayed counterclaim, requesting a full accounting of its own acts as the trustee of the individual trusts. The court subsequently struck this counterclaim, without prejudice to First Alabama's right to maintain individual suits for an accounting.

The case then proceeded to trial on the issue of whether the bank was prudent or imprudent in the purchase or sale of thirty specified securities. Over First Alabama's objection, the trial court impaneled an advisory jury pursuant to Rule 39(c), ARCP, to aid the court in its determination of these issues.[2] The testimony was then heard orally by the trial court and the advisory jury. Special interrogatories requiring a "yes" or "no" answer were submitted to the advisory jury and, while it was unable to reach a unanimous verdict, as to the majority of issues it ruled ten to two against First Alabama.

At that time, the trial judge made his own findings of fact and on June 24, 1982, the court entered an order which found that the defendant as trustee of the common bond fund purchased the following debentures: ATICO Mortgage Investors, Barnett Mortgage Trust, Guardian Mortgage Investors, Justice Mortgage Investors, Midland Mortgage Investors, and Security Mortgage Investors. The trial court concluded that the purchase

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[1] This case was previously before this Court in an unsuccessful attempt by First Alabama Bank to appeal from the class certification. First Alabama Bank of Montgomery, *N.A.* v. *Martin*, 381 So. 2d 32 (Ala. 1980).

[2] First Alabama had also filed several affirmative defenses dealing with the statute of limitations, laches, estoppel, release,—and acquiescence. It was agreed that these issues would not be heard by the advisory jury, so additional evidence was heard on these issues, as well as to the extent of damages suffered by the plaintiffs, after the advisory jury was dismissed.

of these securities by the bank as trustee did not measure up to the "prudent man" standard and were, therefore, imprudent. Because it found the purchase of these securities imprudent, the court found it unnecessary to decide whether the sale of these securities also had been imprudent. These securities were Real Estate Investment Trusts (REIT's), as described later in this opinion.

In its order, the court also found that the bank as trustee of the common equity fund purchased stock of the following companies as investments for the common equity fund: American Garden Products; Ames Department Stores; Beverage Canners; CNA Financial; Elixir Industries; First Mortgage Investors; Hav-a-Tampa; Kinney Services; Loomis Corporation; Mortgage Associates; Transamerica Corporation; Universal Oil Products; Wynn Oil Co.; Associated Coca-Cola Bottling Company; Cox Broadcasting; Rust Craft Greeting Cards; and Sealed Power. The trial court concluded that the purchase of these securities by the bank as trustee did not measure up to the "prudent man" standard and were, therefore, imprudent. Because it found the purchases of these securities imprudent, the court found it unnecessary to decide whether the sale of these securities also had been imprudent.

The court also found that the bank as trustee of the common equity fund purchased the following securities: Allied Chemicals; Amfac; Blue Bell; Pabst Brewing Company; and Purolator. The court concluded that the bank's purchases of these securities did meet the "prudent man" standard but that their sale did not. The trial court concluded that both the purchase and the sale of Green Giant stock and Syntex stock were prudent. The court based its conclusions upon the test set out in *Birmingham Trust National Bank* v. *Henley,* 371 So. 2d 883 (Ala. 1979).

On August 19, 1981, the court ruled against First Alabama on all of its special and affirmative defenses, readopted its class action order of June 24, 1981, and ordered First Alabama to pay \$1,226,798.00 into the bond fund and \$1,426,354.88 into the equity fund. These sums represented the difference between the purchase and sales prices of the six bond fund securities and twenty-two of the equity fund securities. The bank was further ordered to pay interest on these sums.

At trial, the plaintiffs introduced evidence of a "common trust plan" that had been adopted by First Alabama and approved by the Comptroller of the Currency. Testimony showed that the essential investment purpose of the bond fund was to produce income and that the essential investment purposes of the equity fund were the appreciation of equity and production of income. The plan recognized that the valuation of the investments of the common trust funds would vary periodically and it had specific provisions as to how the funds would be valued quarterly to reflect the market value of investments. The evidence showed that the method of valuation was carefully spelled out in that plan, but that First Alabama did not follow that method.

I. Evidence as to Imprudence of Investments in the Equity Fund.

In regard to the equity fund, the court found that the purchase of seventeen of the twenty-four designated equity fund securities had been imprudent. As to these seventeen securities, the court found it unnecessary to decide whether their sale was imprudent but did conclude that the sale of five of the remaining seven securities had been imprudent.

Evidence was introduced showing that in 1973 the board of directors of First Alabama reduced to writing what it considered to be minimum standards of safety. Al Byrne, the vice president

and senior trust officer of the bank admitted, however, that these standards were followed prior to 1973 as unwritten guidelines and were generally so followed at the time in which the sales and purchases in question were made. These standards were: (1) A rating of B+ or better by the Standard and Poor ratings (S & P) (B+ being an average rating and B being a speculative rating); (2) a minimum of 1,500,000 shares of stock in the hands of the public; and (3) annual sales of at least $100 million. Byrne testified that the bank generally invested in companies with at least ten years' experience in business and a record of increased earnings. He stated that the companies would generally be rated by one of the rating services. First Alabama claimed that the bank's minimum standards were primarily designed for individual trusts, rather than common trust funds, yet Byrne stated that when purchases were made for the two common funds, bank policy required that those minimum standards adopted by the bank be followed. Evidence was also presented showing that deviations were permitted from those standards adopted by the board of directors with the approval of the trust investment committee so as to accomplish its goals.

The plaintiffs offered evidence that these standards had not been followed. For example, Associated Coca-Cola, Cox Broadcasting, Rust Craft Greeting Cards and Sealed Power were rated B+ but failed to meet the Bank's requirement of one hundred million dollars in annual sales. In addition, the following stocks failed to meet the minimum requirement of a B+ rating: American Garden Products; Ames Department Stores; Beverage Canners; CNA Financial; Elixir Industries; First Mortgage Investors; Hav-a-Tampa; Kinney Services; Loomis Corp.; Mortgage Associates; Transamerican Corp; Universal Oil Products; and Wynn Oil Co.

Dr. Robert Johnston, chairman of the finance faculty of the School of Business of George Mason University and expert

witness for the plaintiffs, testified that First Alabama, as trustee, should have invested defensively. According to Johnston, a trustee should first provide for the safety of the principal and then obtain an adequate return. He based his conclusions upon a treatise by Dr. Benjamin Graham, which stated seven criteria for testing the safety of investments. These criteria were (1) a minimum of $100 million in annual sales; (2) a current ratio of at least two to one (current assets should be twice current liabilities); (3) a net working capital to long-term debt ratio of at least one to one (net working capital being current assets less current liabilities and long-term debt meaning obligations that mature in more than one year); (4) earnings stability (positive earnings for the last ten years); (5) a good dividend record; (6) an earnings growth measure of at least one-third per share over a ten-year period, averaging the first three years and the last three years to remove extremes; (7) a moderate price earnings ratio of no more than fifteen to one; and (8) a moderate ratio of price to assets of no more than one and one half to one. Johnston believed that a trustee should not purchase stocks which failed to meet any one of these standards. Applying these standards, Johnston concluded that:

1. The purchase of the Allied Chemicals stock did not meet standards 6 and 7.

*2. The purchase of the American Garden Products stock did not meet standards 1, 4, 5, 6, 7, and 8.

*3. The first purchase of Ames Department Stores stock failed standards 1, 5, 7, and 8. The second purchase of Ames Department Stores stock failed standards 1, 5, and 8.

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* The trial court concluded that the purchases of these stocks were imprudent.

4. The first purchase of Amfac stock failed standard 3. The second purchase of Amfac stock failed standards 3 and 7. The third purchase of Amfac stock failed standards 2 and 3.

*5. The purchase of Associated Coca-Cola stock failed standards 1, 2, 3, 5, 7, and 8.

*6. All four purchases of Beverage Canners stock failed standards 1, 4, 5, 6, 7, and 8.

7. The first purchase of Blue Bell stock failed standard 8. The second purchase of Blue Bell stock passed all eight standards.

*8. The purchase of CNA Financial stock failed standards 4, 5, and 6.

*9. Both purchases of Cox Broadcasting stock failed standards 1, 3, 5, 7, and 8.

*10. All three purchases of Elixir Industries stock failed standards 1, 2, 4, 5, 6, 7, and 8.

*11. The purchase of First Mortgage Investors stock failed standards 1, 5, 7, and 8.

12. Both purchases of Green Giant stock satisfied all eight standards.

*13. The purchase of Hav-a-Tampa stock passed all eight standards.

*14. The Kinney Services securities were convertible preferred securities and should not have been in the equity portfolio.

*15. Both purchases of Loomis stock failed standards 1, 3, 4, 5, and 6.

*16. The purchase of the Mortgage Associates stock failed standards 1, 4, 5, 6, 7, and 8.

17. The purchase of the Pabst Brewing stock passed all eight standards.

18. The purchase of Purolator stock failed standards 7 and 8.

*19. All four purchases of Rust Craft Greeting Cards stock failed standards 1, 2, 7, and 8.

*20. The purchase of Sealed Power stock failed standards 2, 3, 7, and 8.

21. The first purchase of Syntex stock failed standards 7 and 8. The second purchase of Syntex stock failed standard 8.

*22. The first puchase of Transamerica stock failed standards 6, 7, and 8 with standards 2 and 3 not being applied. The second and third purchases of Transamerica stock failed standard 6 with standards 2 and 3 not being applied.

*23. The first purchase of Universal Oil stock failed standards 2, 6, and 7. The second purchase of Universal Oil stock failed standards 2 and 6.

*24. The Wynn Oil stock failed standards 1, 4, 5, 6, 7, and 8.

The bank, however, contested Johnston's opinion by testimony from Walter McConnell, an investment banker from New York, who stated that Graham's book was intended for amateurs and not trustees. Also, Johnston on cross-examination was forced to admit that only five of the thirty stocks in the Dow Jones industrial average would meet these criteria. Johnston did not believe that a trustee could protect the principal against inflation by investing in common stocks. However, he did believe buying stocks in an old established company which paid high dividends is better than investing in a new venture.

Walter McConnell, as an expert witness for the bank, listed various criteria to be applied in testing the soundness of an in-

vestment. Among these were the stability of the company, its financial soundness, its debt/equity ratio, the quality of its management, the company's product, and its standing in the industry. He testified that those criteria would not be affected by market cycles or ups and downs in the market. He stated that in his opinion the investments were prudent, though he could not say that his company had recommended the purchase of these stocks while he was an adviser.

McConnell testified that he believed a trustee must take inflation into account in making trust investments. He stated that the most popular approach was to invest in the very best companies, *i.e.*, the best "growth" companies. The idea was that with companies whose earnings and dividends were growing faster than inflation one would be protected against inflation. Another approach, according to McConnell, was not as popular but was still used by some large banks. This approach was to buy stocks in companies that were not well known, *i.e.*, not well recognized and which were selling at much lower prices than the stocks of better known companies. McConnell analyzed the twenty-four stocks at issue and concluded they had a faster growing rate than the general market, and their earnings were also growing faster than the general market, but they were selling at a lower price-earnings ratio. He concluded that First Alabama used a rational investment approach and that the purchases of these twenty-four stocks were prudent. He further testified that S & P ratings were not intended to be used as investment recommendations and that experienced analysts do not use S & P ratings as a guide to sound investments. He further testified that it would be imprudent to buy or sell solely because of the S & P ratings, because one would not be using judgment in his decisions. Evidence was also introduced showing that the S & P ratings were issued with a warning that they should not be used solely as market recommendations.

Eldon Davis, a former trust investment officer of the bank, who was the trust investment officer at the time the investments were made, testified for First Alabama by deposition. He stated that in 1971 and 1972 the stock market was very high. The "Favorite 50" stocks were selling at extremely high prices so he decided to seek out securities that were undervalued in relation to the higher priced ones. He further stated that he did not rely on prospectuses, because the SEC requires a prospectus to be "plastered with a high degree of risk," and "will not let you say anything good about the securities," *i.e.*, will not allow a prospectus to make favorable forecasts or projections. He likewise stated that he saw little difference in stocks rated B, or speculative, and B+, or median, since the rating services "just don't understand the business they are in." It was Davis's opinion that it is best to buy securities in the growth cycle of a company and not after it has matured.

First Alabama also introduced evidence from brokers who had made recommendations as to the stocks in question. Yet, Davis stated that at no time were they recommended as "safe" investments. Evidence was also presented that the recommendations were from brokers who had an interest in inducing the purchase of the stock.

II. Evidence as to Imprudence of Purchases in the Bond Fund.

Substantial questions arose in regard to the bond fund concerning the purchase of securities of six real estate investment trusts (REIT's). REIT's are entities primarily engaged in mortgage lending on security of real estate, or in a combination of lending with the ownership and commercial development of real estate. One witness called REIT's "the mutual funds of real estate." In September 1971, First Alabama purchased the unsecured debentures of six REIT's for $2,608,443.00, which comprised 23.2 percent of the principal of the bond fund. First

Alabama suffered a 47.03 + % loss on these bonds when they were sold for $1,381,645.00, for a total loss of $1,226,798.00.

Questions were raised as to whether REIT's are safe trust investments. Kenneth Campbell, an expert witness for First Alabama, testified that the purchases of the REIT's were prudent investments. Yet he had called REIT's "shaky legal undertakings" in his book, *New Opportunities in Real Estate Trusts* 29 (1978).

Testifying for the plaintiffs, Dr. Johnston stated that REIT's were risky investments. He applied a test set out by Benjamin Graham in his book *Security Analysis* (4th ed. 1962), which included size of the company, ratio of income to fixed charges, ratio of income to fixed charges in the company's worst year, ratio of income to funded debt, value of property ratio, ratio of net assets to funded debt, and a debt to capital funds ratio. Johnston testified that Graham's standards required one to look at the record of an REIT for a period of seven to ten years before making the investment, in order to determine the ratio of income to fixed charges. This was impossible here, however, because all of the REIT's were "too new" to apply this test. Johnston concluded that all six of the REIT's failed to meet the test suggested by Graham. Johnston concluded it was a poor decision to purchase REIT's because there were other options available which were less risky.

The plaintiffs also offered the prospectuses of the REIT's, which contained several pages of risk factors. These risk factors pointed out: (1) That the issuers were mortgage trusts engaged in making high-risk development and construction loans; (2) the competition in that field; (3) the conflict of interest with the sponsor-advisor; and (4) the fact that they operated principally on a leverage basis (that is, borrowing capital to increase earnings). Plaintiffs' evidence showed that the REIT's were making high-risk loans dependent upon the borrower's ability to pay.

The plaintiffs contended that if the borrower had good credit, it could borrow directly from the bank and not have to pay the REIT fee.

Campbell, testifying for the bank, stated that the REIT's concept has limited if not dangerous application for mortgage lending trusts. John Davis, hired by First Alabama to replace Eldon Davis as trust investment officer, testified that in his opinion the purchase of the six REIT's was imprudent because they were all leverage. Davis testified that the REIT's would not meet the standards of the Bank today.

Mr. Byrne testified that in 1972 First Alabama's standards for bond purchases were to buy bonds from companies that were well managed, that were generally AA or better, that had the ability to withstand industry trauma, and that were the larger companies available in the bond market. None of the six REIT's met those standards.

III. Special Defenses

The purchase and sale dates of all securities involved were stipulated to have been at least one year prior to the filing of this action on December 27, 1978. The defendant subsequently pleaded six special defenses, which were denied. As to the statute of limitations and laches, the plaintiffs stated that the defendant was still acting as trustee and that defendant showed no evidence that it had been materially harmed by the fact that the action was filed only in 1978.

As to acquiescence and ratification, the defendant offered no evidence to show that the beneficiaries were advised that the bank had made these purchases or that the minimum standards adopted had not been followed. Neither did the bank offer evidence of any change in its position in reliance on anything done by the beneficiaries sufficient to give rise to an estoppel.

The bank produced a box of releases which it claimed absolved it of any liability. The defendants alleged that these releases would excuse First Alabama from any liability for losses caused by imprudent acts. After hearing the evidence presented, the court held that the defendant did not meet its burden of proof to sustain these six defenses and dismissed all of them.

In its final order the court ordered the defendant to take whatever actions should be necessary to place the common trust funds and beneficiaries in the same position they would have occupied had the bank fully performed its duties. As to the lost principal that was unrecovered, the court determined from the evidence that investment in one-year treasury bills would be fair to the parties. As to the income that the common trust funds would have earned without the transactions complained of, the court ordered First Alabama to calculate the accounts as if it had fully performed the duties as the plaintiffs claimed it should have performed, and to recalculate the accounts as if it had promptly reinvested all the additional income at specified one-year treasury bill rates ranging from 4.61% to 13.23% and averaging 7.5%.

The initial issue raised by the appellant is whether the plaintiffs have standing to invoke the jurisdiction of the equity court to supervise the bank as trustee of the common funds. First Alabama contends that the plaintiffs do not have such standing and contends that they have no proprietary interest in the assets of the bond and equity funds, since the bank itself holds legal title to the assets in the common trust funds. This is without merit.

It has long been the law in Alabama that where a trustee does not perform his duty to protect the trust, the beneficiaries may sue in equity to protect their rights. *Riley* v. *Bradley*, 252 Ala. 282, 41 So. 2d 641 (1948); *Ex parte Jonas*, 186 Ala. 567, 64 So. 960 (1914). Supervising the administration of trusts is a well-

recognized ground of equity, *Scott* v. *Mussafer,* 223 Ala. 153, 134 So. 857 (1931), and the regulation and enforcement of trusts is one of the original and inherent powers of the equity court. *Silverstein* v. *First Nat. Bank of Birmingham,* 231 Ala. 565, 165 So. 827 (1936).

Appellants also contend that the trial court erred in holding that this was a proper class action under Rule 23(b)(1) and (b)(2), ARCP. First Alabama states that the trial court, by certifying the class under Rule 23(b)(1) and (b)(2), without giving notice to the beneficiaries involved, deprived those beneficiaries of the opportunity to opt-out or to be represented by counsel of their choice, thereby violating the due process guarantees of *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), and *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). The appellants further contend that the plaintiffs are seeking primarily money damages and that it was error to allow them to proceed under Rule 23(b)(1) and (b)(2) instead of Rule 23(b)(3). We do not agree.

Neither *Eisen* nor *Mullane* dealt with notice under Rule 23(b)(1) or (b)(2). In fact, Rule 23(c) provides that notice is required *only* in class actions certified under Rule 23(b)(3). Rule 23(b)(1) and (b)(2) class actions have been held not to require notice. *Bolton* v. *Murray Envelope Corp.,* 553 F.2d 881 (5th Cir. 1977); *Robinson* v. *Union Carbide Corp.,* 544 F.2d 1258 (5th Cir. 1977).

We are also unable to agree that this class should have been certified under Rule 23(b)(3). As stated by this Court in the former appeal of this case, "The lower court's rather lengthy certification order ... clearly discloses that each of the factors set forth in Rule 23 was carefully considered before the class action determination was made. The order does not reveal any abuse of discretion." *First Alabama Bank of Montgomery, N.A.* v. *Martin,* 381 So. 2d 32, 35 (Ala. 1980). If the trial court

applies the correct criteria to the facts of the case, the decision is considered to be within its discretion. *Bermudez* v. *United States Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973). Furthermore, the fact that a Rule 23(b)(1) or (b)(2) suit may ultimately result in a monetary recovery from a defendant does not prevent certification under those subdivisions. *Senter* v. *General Motors Corp.,* 532 F.2d 511 (5th Cir.), *cert. denied,* 429 U.S. 870 (1976); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir. 1971). See also, *Muzquiz* v. *City of San Antonio,* 378 F. Supp. 949 (W.D. Tex. 1974), *aff'd,* 520 F.2d 993 (5th Cir. 1975), *judgment vacated and remanded on other grounds,* 438 U.S. 901 (1978), wherein a Rule 23(b)(2) class was certified where an accounting and restitution were sought along with injunctive relief, and *Bermudez* v. *United States Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973), wherein a suit for declaratory relief also sought the payment of benefits pursuant to that declaration under Rule 23(b)(2). We thus hold that the trial court did not err in certifying the class under Rule 23(b)(1) and (b)(2).

First Alabama next argues that the trial court erred in dismissing its counterclaim, which sought an accounting of the 1,250 trusts that participated in the two common funds during the period of time in question. Appellant insists that such a dismissal deprives it of its right as a trustee to ask for an accounting of each trust and thereby deprives it of its property without due process of law. The facts show, however, that First Alabama did not file this counterclaim until after this Court's original decision in this case. Under Rule 13(f), ARCP, leave of court to set up the counterclaim is in the discretion of the trial court and we cannot say that this discretion was abused. Furthermore, under Rule 23(c)(4), the court has the discretion to make necessary orders for the efficient disposition of class actions. The court obviously felt that to allow the counterclaim would make the class unmanageable. It therefore properly

dismissed the counterclaim without prejudice, reserving the right in First Alabama to bring individual actions for accounting.

Another issue raised on appeal is whether the trial court erred in dismissing the six special defenses of First Alabama, thus holding that this action was not barred by the statute of limitations or by the principles of laches, acquiescense, ratification, equitable estoppel, or release. We find no error in the trial court's dismissal of these defenses. First Alabama contends that the fact that all purchases and sales of the bond and equity securities occurred more than one year from the filing of the action in 1978 should cause this action to be barred. The appellant contends that the long-standing rule that the statute of limitations does not run in favor of the trustee of an express trust while the trust continues, *Benners* v. *First Nat. Bank of Birmingham,* 247 Ala. 74, 22 So. 2d 435 (1945), is inapplicable and that the bank should be treated as a constructive trustee. A constructive trust, however, is a creature of equity which operates to prevent unjust enrichment. Such a trust will be found either when property has been acquired by fraud or when, in the absence of fraud, it would not be equitable to allow it to be retained by the constructive trustee. *Brothers* v. *Moore,* 349 So. 2d 1107 (Ala. 1977). In an express trust, legal title to the trust must vest in the trustee, along with the power and duty to manage the trust property. *Hillcrest Golf and Country Club* v. *Paterson,* 217 F. Supp. 176 (N.D. Ala. 1963), *aff'd,* 330 F.2d 613 (5th Cir. 1964). First Alabama has already stated that it holds legal title to the assets of the common trust funds. Thus, it is clear that there existed an express trust between First Alabama and the plaintiff class.

Neither do the principles of laches, acquiescence, ratification, or equitable estoppel apply. First Alabama states that the class members received annual reports and quarterly statements that should have given them notice of the sales and purchases

and should have led to earlier complaints. Yet the law in Alabama places the burden of proving these affirmative defenses on the party asserting them. Thus, in order for the doctrine of laches to apply, First Alabama places the burden of proving these affirmative defenses on the party asserting them. Thus, in order for the doctrine of laches to apply, First Alabama was charged with showing that the alleged neglect or omission of the plaintiffs to assert their rights caused prejudice to the defendant. *Multer* v. *Multer*, 280 Ala. 458, 195 So. 2d 105 (1966). Likewise, for the doctrine of estoppel to apply, the defendant must prove a change in position in reliance upon an act or omission of the other party. *Hendricks* v. *Blake*, 291 Ala. 575, 285 So. 2d 82 (1973). The trial court held, and the evidence showed, that First Alabama did not meet its burden in regard to these defenses.

As to the defenses of acquiescence and ratification, the following rule applies:

> "The rule that beneficiaries cannot question the propriety of a trustee's act, omission, or transaction to which they have given their approval or consent is operative only where the trustee has made a full disclosure and the beneficiaries had full knowledge of all the material facts and circumstances, particularly those relating to the risk involved; or ought to have had such knowledge by reason of means and opportunities directly at their command. They must have had knowledge of, and understood, their rights. They must have been aware of the impropriety or breach of trust involved in the act, omission, or transaction which they approved or to which they gave their consent. In some cases, it has been said that the rule is operative only where their knowledge is actual, and it is clear that the rule is not operative by reason of facts of public record which the beneficiaries are under no obligation to search. It has been held that the beneficiaries must

not only have been acquainted with the facts, but that they must have been apprised of the law, and of how the facts would be dealt with by a court of equity."

76 Am. Jur. 2d *Trusts* § 337 (1975). There was no evidence shown that First Alabama, as trustee, made full disclosure of its actions. The only information received by the beneficiaries was the annual statements, which showed only the purchase and sale of the investments. No disclosures were made informing the plaintiffs of a failure to follow the standards adopted by the bank's trust department. Thus, we find no error in the trial court's holding that these defenses did not apply.

First Alabama also contends that many of the trusts involved in this litigation were terminated and releases were signed prior to the commencement of this suit, which would have released the bank from liability and would reduce the judgment by $500,000.00. These releases, however, were signed upon termination of the trusts and released the bank from further liability on the individual trust accounts. They did not purport to release First Alabama from liability as trustee of the common funds while it still acted in its capacity as trustee. During the portion of the trial concerning damages, the following occurred:

"MR. CRENSHAW: Your Honor, I understand from Mr. Nachman that there is no claim that any of these Releases undertook to release the Bank as trustee of the common funds.

"MR. NACHMAN: Well, our position is that none of these people were beneficiaries of the common fund. It relates to the trust of which they were beneficiary, and it carries with it our contention of releases against any losses [that] may have been incurred by the individual trust by virtue [of] an investment that he was participating in in the common fund. They are the

> class members, the beneficiaries of the individual trusts. Of course, this goes back to one of our earlier points as to why they have no standing."

The trial court found that the appellant did not sustain its burden of proof as to this issue, and we agree.

The next issue raised on appeal is whether this Court should apply the *ore tenus* rule to this action. First Alabama contends that the rule should not apply because not all testimony was taken orally. Again, we do not agree. While there was evidence taken in the form of documents, and while depositions were read into evidence, the trial judge heard a considerable amount of oral testimony. The trial court was placed in the best position to decide the case. It is the law in Alabama that where evidence has been presented orally, a presumption of correctness attends the trial court's conclusion on issues of fact, if these conclusions were based totally or in part on oral testimony. This Court will not disturb the trial court's conclusions unless they are clearly erroneous and against the great weight of the evidence. *Cougar Mining Co.* v. *Mineral Land & Mining Consultants, Inc.*, 392 So. 2d 1177 (Ala. 1981); *Raidt* v. *Crane*, 342 So. 2d 358 (Ala. 1977); *Adams Supply Co.* v. *United States Fidelity & Guaranty Co.*, 269 Ala. 171, 111 So. 2d 906 (1959). Due to the fact that the court reached its conclusion after hearing oral testimony, we hold that the *ore tenus* rule is applicable in this case.

The principal issues to be determined on the merits of this case are whether the trial court erred (1) in finding that the bank acted imprudently in buying or selling the securities, and finding First Alabama to have breached its trust, (2) in assessing interest as a surcharge for imprudent investments, and (3) in ordering a distribution of money damages to the members of the class without identification of the recipients or calculation of their exact damages.

The standard to be followed in determining whether a trustee has breached his duty to the trust was stated in *Birmingham Trust National Bank* v. *Henley,* 371 So. 2d 883 (Ala. 1979):

"The general definition of a trustee's investment duties was first stated by the Supreme Court of Massachusetts in *Harvard College* v. *Amory,* 9 Pick. 446, 461, 26 Mass. 446, 461 (1830):

" 'All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.'

"The Restatement of the Law of Trusts 2d, § 227 (1959), states the rule in the following language:

" 'In making investments of trust funds the trustee is under a duty to the beneficiary

" '(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived ....'

"....

"BTNB is liable to the Trust in the Birmingham Realty matter only if it breached some duty to the Trust in refusing to make this investment at the time the decision was made. Was it an investment which a prudent man, managing his own affairs, would have made, based upon information then available? Liability cannot be based on the fact

it subsequently developed that the investment would have been a good one. This is but the converse of the rule that a trustee is not liable if he makes an investment in a security which subsequently depreciates in value. III Scott on Trusts, § 204, *supra*, expresses the rule as follows:

" 'The failure to make a profit which does not result from a breach of trust does not subject the trustee to liability. Thus if by the terms of the trust he is permitted but is not directed to invest in certain securities, he is not liable for failure to make the investment, although the securities subsequently appreciate in value. ...'

"The rule has also been summarized by Headley, *Trust Investments*, [97] Trusts & Estates 739 (1952), as follows:

" 'The first and all inclusive requirement of the law is that a trustee shall act with complete and undivided loyalty to his trust. Second is that a trustee shall act prudently in the selection and management of investments. The elements of prudence are:

" '(1) Care — a trustee must gather and weigh the facts and base his decisions on them rather than on rumor or guesswork;

" '(2) Skill — a trustee must exercise the skill of the average person as a minimum; and if he has more than average skill he must exercise such skill as he has;

" '(3) Caution — a trustee must not take chances which will imperil the accomplishment of the purposes of the trust.

" '....

" '... There must be balance between security of principal and amount and regularity of income; and the governing motive of the trustee must be sound investment for a long period and not speculation for a profit...'

"With specific reference to a trustee's investing in common stocks, this author says:

" '... They represent no promise to return a dollar amount to the investor; their dividends are dependent on earnings and the action of a board of directors; they have always afforded an attractive vehicle for speculation. Nevertheless some of them have demonstrated, over a long period of years, the qualities required for sound permanent investments. Intrinsic values have been maintained and dividends have been adequate and regular. The principal has been reasonably safe for a number of reasons: competent management, sound financing, position in an essential industry, a successful record and an adequate market....' "

371 So. 2d at 894-96. Tested by this standard, we cannot say that the trial court committed reversible error in finding that the defendant did not fulfill its duty of caution, to preserve the trust corpus above all else, while striving for a regularity of income.

As to the imprudence of the equity fund, First Alabama contends that since Alabama is a "legal list" state, and since the beneficiaries had given their permission for the bank to invest in items not on the legal list, then the beneficiaries have no complaint for investments that have gone awry. This argument is without merit. As a trustee, First Alabama has a duty to preserve the trust property and make it productive. III *Scott on Trusts* § 227 (3rd ed. 1967).

First Alabama also contends that the only reason for holding it liable for the losses on the purchase and/or sale of the securities was that the ratings were below B+ on the S & P chart, and that the only reason for holding it liable for the losses on the REIT's was that there was no Moody's or similar rating. First Alabama asserts that to hold it liable here on such evidence

would impose a duty upon trustees that would make them absolute insurers against a drop in market price. This, however, is not the case. First Alabama cannot be held liable for its failure to meet its own standards. This is only one factor in the decision. The evidence in this case supports the decision of the trial court that First Alabama failed to fulfill its primary responsibility which was to provide for the safety of the trust's principal. The secondary responsibility was to insure an adequate return.

The difference between speculation and investment is well described by Dr. Headley in Headley, *Trust Investments,* 97 Trusts & Estates 739 (1952), quoted above in the quotation from *Birmingham Trust National Bank* v. *Henley,* 371 So. 2d at 895. As Dr. Headley states, one who buys common stocks with the idea of selling them on the market for higher prices is speculating. One who is making a prudent investment examines the stocks' intrinsic values and purchases them for a long-term investment. Walter McConnell, testifying for the defendant, stated that one approach adopted by trust managers is to pick established stocks and not worry about subsequent turns in the market price. It is obvious that neither Headley's standards, nor those mentioned by McConnell, were consistently used by First Alabama.

Dr. Robert Johnston, an expert witness for the plaintiffs, also testified as to how a trustee should conduct his investments. Dr. Johnston stated that, in his opinion, trustees should invest defensively and protect the principal. He testified that most of the seventeen stocks later found to be imprudent investments would fail to meet his tests. While Walter McConnell, an expert witness for the bank, stated that he believed the purchases to be prudent, he could not say that he, as an investment adviser for a number of trust companies, had ever recommended the purchase of any of the twenty-four stocks at issue.

Finally, the testimony of Eldon Davis, who made the investments at issue, further strengthens the holding of the trial

court. As stated above, Mr. Davis testified that he did not look at prospectuses, that he saw little difference between a stock rated B+, or median, and one rated B, or speculative, that he did not think the rating services understood their business, and that he tried to buy undervalued stocks instead of the higher priced, more established ones. All of this evidence, taken together, supports the holding of the trial court that First Alabama was imprudent with regard to purchases made for the equity fund.

We also find no error in the trial court's holding that the sale of the five stocks was imprudent. Even Eldon Davis testified in his deposition that he was against the sale of these stocks and had recommended that they be held. Mr. McConnell, testifying for First Alabama, stated that during the recovery period after the recession the five stocks all had higher recovery rates than the S & P 500. It seems reasonable to state that had these stocks not been sold at the bottom of the market, there would have been no loss. It is true that a trustee will not be held liable under ordinary circumstances for losses due to unforeseen depression or recession of the stock market. Yet, where the course of dealing of the trustee is such that it causes the loss, a trustee will be liable. *First Nat. Bank of Birmingham* v. *Basham*, 238 Ala. 500, 191 So. 873 (1939). Here, First Alabama sold these stocks at or near their lowest price levels, against the advice of its own trust officer, and at the time the country was just beginning to recover from the worst recession since the 1930's. We cannot hold as a matter of law that the trial court erred or was plainly and palpably wrong in its conclusion that a reasonable and prudent man would have held these stocks. We therefore affirm the trial court's decision that the sale of the five stocks was imprudent.

It does appear clear from the evidence before the trial court that the investment in six REIT's for the common bond fund

was imprudent. The six REIT's were all three years old or less, they were not listed among the top REIT's in the country, and they were among the weakest of the nation's REIT's. They did not meet the standards of Al Byrne, Robert Johnston, and Kenneth Campbell, all experts in the case. Thus, we hold that the trial court committed no error in holding against First Alabama as to the purchase of the six REIT's.

First Alabama also insists that the trial court erred in ordering the bank to pay interest on the judgment at an interest rate based on the one-year treasury bill rates and to compound such interest quarterly. The defendant says that for it to have invested in treasury bills initially would have been improper, and for it now to be forced to calculate interest as if it had invested in this method will also be improper. First Alabama cites *Gordon* v. *Brunson,* 287 Ala. 535, 253 So. 2d 183 (1971), where this Court held that an interest surcharge for breach of trust should be no more than the rate of return that would have been earned had the trustee properly performed his duties and that compound interest will be imposed only where there is an evil or corrupt intent. The defendant states that *Gordon* mandates that only simple interest be charged on the judgment and that the treasury bill rate of interest is too high. We agree. While the rate and amount of interest is a matter within the sound discretion of the trial court, it is error for the court to order compounded interest without a finding of evil or corrupt intent. Therefore, because the trial judge in this case made no finding of evil or corrupt intent, only simple interest should be charged.

Finally, the defendant contends that the trial court ordered a distribution of money damages to the class members without identification of the members or of their exact damages. This is not the case. The evidence shows the names of the beneficiaries of the 1,250 trusts, all of which names are on file in First Alabama's computer. The order of the trial court sets out in

detail how this calculation and distribution are to take place. Thus, we cannot agree with the defendant that the trial court was in error on this point.

After careful consideration of the many issues presented on appeal, this Court has determined that the trial court did not err in finding for the plaintiffs. We reaffirm the "prudent man rule," which states that a trustee must only exercise *sound* discretion, conduct himself faithfully, and manage funds entrusted to him as men of prudence, discretion, and intelligence would manage their own affairs, having due regard for the safety of the corpus and probable income. *Harvard College* v. *Armory,* 26 Mass. (9 Pick) 446 (1830). See also, *Birmingham Trust National Bank* v. *Henley,* 371 So. 2d 883 (Ala. 1979). We conclude that the trial court applied the "prudent man rule." Based upon the foregoing principles and the *ore tenus* rule, the finding of imprudence by the trial court is due to be affirmed. As to the compounding of interest, we hold that the trial court did commit error and we reverse with instructions to charge simple interest on the judgment.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

Jones, Shores, Embry,** Beatty, and Adams,** JJ., concur.

Faulkner, J., recused.

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* While this Justice did not sit at Oral Argument, he has listened to the tapes of the Oral Arguments and studied the briefs.

APPENDIX B
January 14, 1983

80-853

prudent man would have held these stocks. We therefore affirm the trial court's decision that the sale of the five stocks was imprudent.

It does appear clear from the evidence before the trial court that the investment in six REIT's for the common bond fund was imprudent. The six REIT's were all three years old or less, they were not listed among the top REIT's in the country, and they were among the weakest of the nation's REIT's. They did not meet the standards of Al Byrne, Robert Johnston, and Kenneth Campbell, all experts in the case. Thus, we hold that the trial court committed no error in holding against First Alabama as to the purchase of the six REIT's.

First Alabama also insists that the trial court erred in ordering the bank to pay interest on the lost principal at a rate equal to one-year treasury bill rates. The defendant says that for it to have invested in treasury bills initially would have been improper, and for it now to be forced to calculate interest as if it had invested in this method will also be improper.

The rate and amount of interest is a matter in the sound discretion of the court to be determined by the circumstances of each case and should, at a minimum, restore to the beneficiaries the income they otherwise would have received. *Pennsylvania Co.* v. *Wilmington Trust Co.*, 41 Del. Ch. 153, 189 A. 2d 679 (1963). By using the treasury bill rate, the court set out a readily determinable specific interest rate to be applied in each year. It is our opinion that the trial court did not abuse its discretion here.

Additionally, First Alabama argues that it was improper for the trial court to compound the interest paid on the lost principal on a quarterly basis. First Alabama cites *Gordon* v. *Brunson*, 287 Ala. 535, 253 So. 2d 183 (1971), where this Court held that an interest surcharge for breach of trust should be no more than the rate of return that would have been earned had the trustee properly performed his duties and that compound interest would be imposed only where there was an evil or corrupt intent. The defendant states that that case mandates that only simple interest be charged on the judgment. We do not agree.

In Alabama, a court of equity is authorized to mold its decree so as to adjust the equities of the parties and meet the necessities of each situation. *Coupounas* v. *Morad*, 380 So. 2d 800 (Ala. 1980); *BBC Investment Co.* v. *Ginsberg*, 280 Ala. 148, 190 So. 2d 702 (1966). Where a trustee makes an investment that is improper, it is equitable for the court to put the parties in the position they would have occupied except for the breach of trust. Here, the Bank as trustee of the Common Trust Fund was required to pay income quarterly to the individual trusts. Clearly the Bank as trustee of the individual trusts would have been under a duty to distribute or reinvest the income that should have been received. Since it is clear that such income was not distributed, we hold that the trustee would have been required to reinvest the same. *Opinion of the Justices*, No. 65, 244 Ala. 456, 13 So. 2d 559 (1943). First Alabama argues that *Gordon*, *supra*, mandates that only simple interest is due to the beneficiaries absent a finding of evil or corrupt intent on the part of the trustee. While we agree that a situation where the trustee is guilty of evil or corrupt intent is *one* situation where interest is compounded, it is clearly not the *only* one.

We find support for this result from several authorities. Scott indicates, "It has also been held that [the trustee] is liable for compound interest where it was his duty to reinvest interest received by him...." A. W. Scott, *Law of Trusts* § 207.2 (1967). The Restatement 2d of the Law of Trusts also supports this result:

> "If the trustee is under a duty to reinvest interest received by him and accumulate it for the beneficiary, and fails to do so, he is chargeable with compound interest, since if he had not committed a breach of trust he would have received compound interest."

Restatement (Second) of Trusts, Comments, § 207 (1959). Since we have held that the trustee would have been required to reinvest the income on the lost principal, it is clear that the trial court's order to compound interest and to make such computations on a quarterly basis is without error.

Finally, the defendant contends that the trial court ordered a distribution of the fund to the class members without identification of the members or their exact loss. This is not the case. The evidence shows the names of the beneficiaries of the 1,250 trusts, all of which names are on file in First Alabama's computer. The order of the trial court sets out in detail how this calculation and distribution are to take place. Thus, we cannot agree with the defendant that the trial court was in error on this point.

After careful consideration of the many issues presented on appeal, this Court has determined that the trial court did not err in finding for the plaintiffs. We reaffirm the "prudent man rule," which states that a trustee must only exercise *sound* discretion, conduct himself faithfully, and manage funds entrusted to him as men of prudence, discretion, and intelligence would manage their own affairs, having due regard for the safety of the corpus and probable income. *Harvard College* v. *Armory,* 26 Mass. (9 Pick.) 446 (1830). See also, *Birmingham Trust National Bank* v. *Henley,* 371 So. 2d 833 (Ala. 1979). We conclude that the trial court applied the "prudent man rule." Based upon the foregoing principles and the *ore tenus* rule, the findings of the trial court are due to be affirmed.

AFFIRMED

Jones, Shores, Embry,** Beatty, and Adams,** JJ., concur.

Faulkner, J., recused.

ON APPLICATION FOR REHEARING

TORBERT, CHIEF JUSTICE.

After the original opinion was issued, a motion was made by the appellees to amend the original judgment by adding thereto, pursuant to § 12-22-72, Code 1975, ten percent of $2,653,152.88, the amount the circuit court ordered the Bank to pay into the two trust funds. The motion is denied.

The ten percent penalty provided by § 12-22-72 is not imposed unless the judgment is for money. *Lloyd* v. *Stewart*, 258 Ala. 627, 64 So. 2d 884 (1953).

The appellees took the position in their briefs and oral argument that this was not a suit at law for money damages, but was a request for equitable relief to enforce the duties of a paid trustee.

The judgment of the circuit court declared that certain purchases and sales of securities by the Bank, as trustee of the Equity Fund and the Bond Fund, were imprudent and that the transactions constituted a breach of the fiduciary duty owed by the Bank to the plaintiffs and their classes, and ordered the Bank to do specified acts to put the two trust funds and the classes of plaintiffs in the same position they would have occupied if the Bank had not breached its duty but had fully performed.

Section 12-22-72, Code 1975, provides that when a judgment or decree is entered for money, whether debt or damages, and the same has been stayed on the execution of bond with surety,

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** While this Justice did not sit at oral argument, he has listened to the tapes of the oral arguments and has studied the briefs.

if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10% damages thereon, and the costs in the appellate court.

In *Wheeler* v. *First National Bank of Santa Anna, Cal.* 73 P.2d 889, 892 (Cal. 1937), where the beneficiary of a trust sought to cancel transfers made by trustee to trustor, it was held that a provision for the payment of $5,000 into the trust corpus by the defendant was not a money judgment for damages or debt.

In *Moore* v. *Carney,* 269 N.W. 2d 614, 617 (Mich. Ct. App. 1978), where the judgment ordered a corporation and two of its directors to restore a minority shareholder to the position she occupied prior to oppressive acts, which began in 1969, by requiring the defendants to purchase the minority shareholder's stock from her at the value of the stock in 1969, it was held that the judgment was not a money judgment but was part of an equitable remedy.

The judgment in this case was not a judgment for money as debt or damages. Section 12-22-72, Code 1975, does not apply to this judgment. Rather, the treasury bill rate of interest will continue to be applied until the funds are restored to the beneficiaries.

ORIGINAL OPINION MODIFIED; OPINION EXTENDED; AFFIRMED; MOTION FOR PENALTY DENIED; APPELLANT'S APPLICATION FOR REHEARING OVERRULED; APPELLEES' APPLICATION FOR REHEARING GRANTED.

Jones, Shores, Embry,** Beatty, and Adams,** JJ., concur.

Faulkner, J., recused.

** While this Justice did not sit at oral argument, he has listened to the tapes of the oral arguments and has studied the briefs.

APPENDIX C

February 2, 1983
THE STATE OF ALABAMA —
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1982-83

80-853

First Alabama Bank of Montgomery

v.

Charlotte Kyle Martin, et al.

ORDER

First Alabama Bank, having filed in this Court its petition for stay of judgment, wherein it states that it intends to file a petition for writ of certiorari to the Supreme Court of the United States and seeks a stay of judgment pending disposition of the petition for writ of certiorari in the Supreme Court of the United States, and the response of the appellees thereto having been submitted and duly examined and understood by the Court,

IT IS, THEREFORE, ORDERED that the judgment be, and the same is hereby, stayed for a period of ninety (90) days from January 14, 1983, conditioned upon the appellants filing in this Court a supersedeas bond as provided in Section 2101(f) of the Judicial Code.

IT IS FURTHER ORDERED that First Alabama Bank, or its attorney, shall file in this Court a copy of the petition for certiorari filed in the United States Supreme Court and that unless a copy of such petition for certiorari is filed in this Court within

ninety (90) days from January 14, 1983, the stay herein ordered shall automatically terminate.

IT IS FURTHER ORDERED that if First Alabama Bank, or its attorney, filed in this Court within ninety (90) days from January 14, 1983, a copy of the petition for writ of certiorari filed in the United States Supreme Court the, stay shall remain in full force and effect pending proceedings on the writ of certiorari in the Supreme Court of the United States, or until the further orders of this Court.

Torbert, C. J., and Maddox, Jones, Shores, and Adams, JJ., concur.

Embry and Beatty, JJ., dissent.

Faulkner, J., recuses himself.

Almon, J., not sitting.

APPENDIX D

THE STATE OF ALABAMA —
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1979-80

78-775

First Alabama Bank of Montgomery, N.A.

v.

Charlotte Kyle Martin, et al.

Appeal from Montgomery Circuit Court

BEATTY, JUSTICE.

Defendant, First Alabama Bank of Montgomery, seeks to appeal from an order certifying an action against it as a class action under ARCP 23(b)(1)(A), 23(b)(1)(B) and/or 23(b)(2) and designating two classes of plaintiffs. The purported appeal as of right is dismissed and the alternative request for permission to appeal is denied.

In December, 1978, plaintiffs Charlotte Martin and Kathleen Gerson filed suit against defendant First Alabama Bank [hereinafter "Bank"] charging that the Bank, by making imprudent investments with the assets of two common trust funds controlled by it, had violated its duties as trustee of the common funds. Two other plaintiffs were later added by amendment. The original plaintiffs and the intervenor-plaintiffs all are beneficiaries of trusts of which the Bank is (or was) trustee.

The complaint, as last amended, claims that as trustee of the individual trusts the Bank took from the plaintiffs and others

similarly situated instruments under which it was given the discretionary power to invest the assets of the trust in participating units of two Common Trust Funds (the "Bond Fund" and the "Equity Fund") maintained by the Bank. Plaintiffs averred that from 1971 through 1978 the Bank used substantial portions of the principal of the individual trusts to purchase units in one or both of the common funds, and that in its capacity as manager of the common funds the Bank made imprudent investments with the monies in the common funds, which investments resulted in substantial losses to the funds. Plaintiffs sought an order that the suit could properly be maintained as a class action under ARCP 23(b)(1) or 23(b)(2), a declaration that the defendant "as a paid Trustee was chargeable with the primary duty of maintaining the integrity and safety of the principal of the trust funds" which was invested in each of the common funds, a declaration that the defendant is liable to account to each of the common trust funds "for all losses resulting from the making of imprudent, unsafe, speculative, or risky investments and for loss of income thereon," and a declaration that certain investments made by the Bank as manager of the common funds were in fact imprudent. The complaint further sought to require the Bank to restore to the common trust funds the losses allegedly sustained because of the Bank's improper investments.

As we have indicated, plaintiffs seek to maintain this suit as a class action under ARCP 23. They contend that they should be permitted to sue both for themselves and "as representative parties on behalf of all persons similarly situated, who held beneficial interests in participating units" of each of the common trust funds from 1971 through 1978. The Bank has continuously opposed the certification of the action as a class action. After months of discovery regarding the issues posed by the class action allegations, the trial court conducted a hearing on the class action question. The court then entered an order (1)

certifying the suit as a class action under ARCP 23(b)(1)(A), 23(b)(1)(B) and/or 23(b)(2), and (2) denominating two classes of plaintiffs: a class composed of beneficiaries whose trust funds were invested in the "Bond Fund" from 1971 through 1978 and a class composed of beneficiaries whose trust funds were invested in the "Equity Fund" during the same period. The trial court accordingly denied defendant's motion to dismiss the complaint and its motion for partial summary judgment on the class action aspect of the complaint. Defendant then filed a notice of appeal to this Court and, alternatively, submitted a petition for permission to appeal from an interlocutory order.

I

As a general proposition, one has the right to appeal only from a "final judgment" of the circuit court. *See* Code of 1975, § 12-22-2. The first question presented here is whether the circuit court's order allowing this suit to proceed as a class action under ARCP 23 was a final judgment which will support an appeal as a matter of right. We hold that it was not.

A final judgment has been defined by this Court as an order or decree which puts an end to all matters litigated or which ought to have been litigated with respect to a particular controversy. *In re Estate of Amason,* 347 So. 2d 393 (Ala. 1977). An order certifying a class is inherently not a *final* judgment, even regarding the class certified, because ARCP 23(c) expressly permits the trial judge to revise his original order at any time before passing on the merits of the case. As the United States Court of Appeals for the Second Circuit pointed out in *Parkinson* v. *April Industries, Inc.,* 520 F. 2d 650 (2d Cir. 1975):

> The granting of a class designation is in no sense an effective termination of any aspect whatever of the litigation, but only directs the form in which the action will proceed. The initial order is strictly provisional and by the terms of

> Rule 23(c)(1) "may be altered or amended before the decision on the merits." An order granted prior to discovery may be reevaluated on the basis of acts emerging from a fuller record, and a decision by an appellate court upon an appeal from the initial order would not settle the propriety of the designation once and for all because new information might well require a revision of the original order by the district court. The possible likelihood of successive appeals on the same issue, a concern which lies at the heart of the final judgment rule, exists.

520 F. 2d at 653.

The validity of the view that "orders granting class certification are interlocutory" — as has been held in a host of federal appellate court decisions [*see, e.g., Re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F. 2d 213 (8th Cir.) *cert. den.* 423 U. S. 947, *reh. den.* 423 U. S. 1039 (1975); *Blackie* v. *Barrack,* 524 F. 2d 891 (9th Cir. 1975); *Katz* v. *Carte Blanche Corp.,* 496 F. 2d 747 (3rd Cir.) *cert. den.* 419 U. S. 885 (1974); *Bennett* v. *Behring Corp.,* 525 F. 2d 1202 (5th Cir.) *cert. den.* 425 U. S. 975 (1976)] — was recently sustained by the U. S. Supreme Court in *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463, 476 (1978). We find the federal cases on this issue most persuasive, and, accordingly, hold that we are without jurisdiction to entertain the Bank's attempt to appeal as a matter of right. *See McKleroy* v. *Gadsden Land & Development Co.,* 126 Ala. 184, 28 So. 660 (1900).

II

In addition to asserting that it has a right to maintain an appeal from the trial court's order allowing this case to proceed as a class action, First Alabama Bank has alternatively petitioned this Court for permission to appeal from an interlocutory order. We deny the Bank's ARAP 5 petition for permission to appeal.

Rule 5, ARAP, the means by which a party may obtain interlocutory review of a non-final order, is a composite of FRAP 5 and 28 U.S.C. § 1292(b). *See* ARAP 5, Committee Comments. Because this Court has not previously had occasion to address the question of when, if ever, interlocutory review of an order granting class action status is warranted, we have engaged in a rather extensive review of the federal cases dealing with the appealability *vel non* under 28 U.S.C. § 1292(b) of class action orders. Our survey of the pertinent decisions of the federal courts, as well as an in-depth analysis of the arguments of the parties, has convinced us that interlocutory orders which grant class certification are not susceptible to effective review.

As is required under ARAP 5, the Bank's petition for permission to appeal contains the trial judge's certification that the interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal from the order would materially advance the ultimate termination of the litigation and that the appeal would avoid protracted and expensive litigation. . . ." This Court, however, is not bound by the trial court's conclusion that an immediate appeal is desirable, for ARAP 5 mandates that both the trial court and the Supreme Court concur in allowing an appeal from an interlocutory order. *See, e.g., Control Data Corp.* v. *International Business Machines Corp.*, 421 F. 2d 323 (8th Cir. 1970). The discussion which follows is a brief summary of our reasons for refusing to grant permission to appeal in this case.

As we have mentioned, class action determinations are inherently provisional under the terms of ARCP 23. The trial court is at liberty to alter or amend the order granting class action status at any time before deciding the merits of the case. The court may even terminate the class status if further developments so dictate. *See Wilcox* v. *Commerce Bank*, 474 F.

2d 336 (5th Cir. 1973). Our intervention at this preliminary stage would constitute an uncalled-for encroachment upon the trial court's power to manage its own cases and would place this Court in the position of an advisory panel. That is not our function.

We are also unable to perceive any "controlling question of law" posed by this case in its present posture that might merit our attention pursuant to Rule 5, ARAP. Determinations allowing class actions to proceed rest largely within the discretion of the trial court; in the words of Judge Frankel of the U. S. District Court for the Southern District of New York, such a decision "involves a particular appraisal of specific facts and is to a measurable extent discretionary." *Shelter Realty Corp.* v. *Allied Maintenance Corp.*, 442 F. Supp. 1087, 1089 (1977). As our system of jurisprudence is largely predicated on the studied discretion of trial judges, we are not at all disturbed by the fact that decisions of such moment as orders permitting a class action to proceed must be made by the individual trial judges without the assistance of appellate courts. *See Anschul* v. *Sitmar Cruises, Inc.*, 544 F. 2d 1364 (7th Cir. 1976). Only if it appears that a trial court arbitrarily refused to apply the criteria enunciated in ARCP 23 to the facts of a particular case would we be inclined to permit an interlocutory appeal from an order granting class certification. The lower court's rather lengthy certification order in this case clearly discloses that each of the factors set forth in Rule 23 was carefully considered before the class action determination was made. The order does not reveal any abuse of discretion.

Our decision to refuse to grant permission to appeal in the instant case is buttressed by some of the language employed by the Third Circuit Court of Appeals in *Link* v. *Mercedes-Benz of North America, Inc.*, 550 F. 2d 860 (3rd Cir. 1977). The *Link* case was an attempted appeal under 28 U.S.C. § 1292(b) of an

interlocutory order certifying a plaintiff class of some three hundred thousand persons pursuant to FRCP 23(b)(3). Although the district court had certified certain questions as "controlling" the Court of Appeals refused to review the order determining the class. After pointing out that acceptance of § 1292(b) appeals in unexceptional cases would constitute an "erosion of the prohibition against 'piecemeal' appellate review," the court ruled that:

> [A class action] determination, in and of itself, does not present a "controlling question of law" to which this court should be hospitable under § 1292(b). If the district court has qualms about determining the class, because it has a serious question whether it is "applying[ing] the correct criteria to the facts of the case," . . . (a) it should hesitate in determining the class until reasonably assured of the correctness of its ruling and (b) it should not certify for § 1292(b) consideration without stating persuasive reasons why the particular class action question is so unusual as to demand the intervention of an appellate court. In affording immediate appellate review of "controlling questions of law," § 1292(b) was not designed to substitute wholesale appellate certainty for trial court uncertainty under circumstances where, as here, the Rule gives broad discretion to the district court to revise its class action determination at any time prior to the decision on the merits.

550 F. 2d at 863.

The considerations articulated by the *Link* court concerning § 1292(b) appeals apply with equal force to appeals under ARAP 5. The trial judge here did not specify what questions of law he felt were controlling, and the arguments advanced by the Bank regarding the alleged misapplication of the Rule 23 criteria by the trial court have not persuaded us that any such questions exist. As a result we deny the Bank's request for permission to appeal.

APPEAL DISMISSED; REQUEST FOR PERMISSION TO APPEAL DENIED.

Torbert, C. J., Maddox, Faulkner, Jones, Almon, Shores and Embry, JJ., concur.

APPENDIX E

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION
NUMBER CV-78-1491-H

Charlotte Kyle Martin and Kathleen Gerson, etc., et al,
Plaintiffs

v.

First Alabama Bank of Montgomery, N. A.,
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This action is brought by the named Plaintiffs pursuant to Rule 23, *Alabama Rules of Civil Procedure*, against First Alabama Bank of Montgomery, N. A., hereinafter called the "Bank". Upon consideration of the pleadings and the evidence, the Court makes the following Findings of Fact, Conclusions of Law, and Judgment:

1. At all times herein material, the Bank has maintained two Discretionary Common Funds, known as the "Bond Fund" and the "Equity Fund". The Bank is, and throughout the relevant times, has been the sole Trustee of each such fund. The only investments in the two funds are made from individual Trusts, of which the Bank is Trustee or Co-Trustee. The named Plaintiffs are or were beneficiaries of individual Trusts of which the Defendant was Trustee or Co-Trustee, of which Trusts certain funds were invested in one or more of the two common funds. Investments were made in the two common funds by more than 1,200 Trusts, under which the Bank was Trustee or Co-Trustee.

2. In the management of the Equity Fund and the Bond Fund, the Bank owed to the named Plaintiffs and the classes represented by them, the fiduciary duty to manage the investments in the common fund as:

> "A prudent man would make of his own property, having in view the preservation of the estate and the amount of income to be derived. . ." *The Restatement of the Law of Trusts*, 2d, Section 227 (1959)

In determining the prudence of the purchase and sale of the securities discussed below, the Court has applied the standards adopted by the Supreme Court of Alabama in *Birmingham Trust National Bank* v. *Henley*, 371 So.2d 883 (1979).

3. On July 26, 1979, the Court entered a class action Order, pursuant to Rule 23, *ARCP*. The Court herewith re-adopts the findings of the Order of July 26, 1979.

4. On June 24, 1981, the Court entered an Order declaring certain purchases and sales of securities by the Bank, as Trustee of the Equity Fund and the Bond Fund, to have been imprudent; and that said transactions constituted a breach of the fiduciary duty owed by the Bank to the Plaintiffs and their classes. The Court herewith re-adopts the findings of the Order of June 24, 1981.

5. Having made such determination and declaration, the Court proceeds to consider the relief which should be granted and the actions necessary to be performed by the Bank to fulfill its continuing obligation as Trustee of the two common funds. In the opinion of the Court, justice requires that so far as is possible, the Bank must be required to put the two trust funds and the classes of plaintiffs in the same position as they would have occupied had the Bank not breached its duty, but had fully and faithfully performed the same. The Bank has at all times occupied, and continues to occupy, the position of a Trustee; and

has at all times owed and still owes to each of the members of the plaintiff classes, the high fiduciary duty required of a paid Trustee. Until final settlement of these issues with each of the Plaintiffs, the Bank continues to owe such fiduciary duty. The determination that the Bank breached its fiduciary duty at the time of purchase or sale of securities in the common funds does not relieve the Bank from such continuing fiduciary duty.

6. So far as the principal invested in the securities above decreed to have been imprudent purchases, the relief is plain. The Bank must be required to restore to each of the common funds, the entire amount expended from the principal of those funds in the making of the imprudent investments, and is required in all respects to treat the principal of such common funds as if said imprudent investments had never been made. Where funds were received by the Bank upon the sale of the securities found to have been imprudently purchased, such receipt operates as a credit against the total sums imprudently invested.

7. Throughout the period from 1971 to date, and until its duty is discharged by full performance, the Bank has owed to each of the members of the Plaintiff classes the duty to prudently invest the principal of the funds entrusted to it. This duty has been summed up by stating that it is the duty of the Trustee to invest in securities returning the highest income commensurate with safety, safety being always the first and income the second consideration. "Equity regards that as done which ought to be done"; and the parties should be put in the same position they would have occupied had said funds been promptly and properly invested.

8. The plan pursuant to which the two common funds are established provides for a fiscal year beginning on December 1. Units in the two funds were purchased for the individual Trusts, based on quarterly valuations of all securities held in the com-

mon fund. Liquidation of units were based on the same quarterly valuations. In determining the relief herein provided, the Court has considered the plan under which the two funds are managed. During the period of time covered by the litigation, participating units in the common funds have been purchased by individual trusts and participating units have been liquidated. As to all funds lost as a result of the Bank's breach of its fiduciary duty, the loss of principal in the common funds should be restored so that the participating units would receive the benefit or payment of the restoration of such loss just as if the principal of the common funds had not been imprudently invested by the Bank. Under the plan, income is to be distributed quarterly. The income lost as a result of the imprudent investments must be restored for the benefit of the participating units, and where participating units have been liquidated, the income which should have been earned must be distributed to the owners of the liquidated units.

9. *Adjustment of Lost Principal, Bond Fund.* The Court finds that as a result of the Bank's breach of its fiduciary duty in the purchase of those securities described in Paragraph 1 of the Order of June 24, 1981, the Bond Fund sustained a loss of principal in the amount of $1,226,798.00. The Bank should be required to put the Bond Fund and the holders of beneficial interests therein, in the same position they would have occupied except for such breach of duty. The Bank is, therefore, ordered and directed to recalculate and restate the quarterly valuations of the Bond Fund from December 1, 1971, to date as if the imprudent purchases had not been made. The principal of the Bond Fund should thus be restated as if the principal amount invested in the imprudent securities was held in cash instead of in the securities found to be imprudent. As of the date of sale of each of said imprudent securities, a certain amount was converted into cash and thereafter held by the Bank, and, presumably, was properly invested. To reconstitute the fund as

if such imprudent purchases had not been made, it is necessary for the Bank to replenish the principal of the Bond Fund as of the date of each such sale, by paying into the principal account of the Bond Fund the difference between the purchase price of each such security and the sale price thereof. The Bank is ordered to forthwith pay into the principal account of the Bond Fund the said sum of $1,226,798.00. The Bank is further ordered to recalculate and restate each quarterly valuation of principal as if such securities had neither been purchased nor sold. The Bank is further ordered to promptly distribute to the owners of the participating units, including those participating units previously withdrawn, any principal amounts due on the basis of such restated quarterly statements.

10. *Adjustment of Lost Income, Bond Fund.* The evidence shows that the Bond Fund received income on the securities imprudently purchased, down to the date of their disposition. Such income was distributed each quarter to the then holders of participating units. The Court does not find that any adjustment of income is required for such period down to the sale of each of the imprudent securities.

As of the date of each sale thereof, the Bank received the proceeds of the sale which, it is assumed, were properly invested in other securities. The Court, therefore, finds that there has been no loss of income as to that portion of the principal which was recovered by sale and reinvested. However, the Court finds as a fact that the Bond Fund, and thereby the holders of the participating units therein, have lost the income which would and should have been earned on that portion of the principal lost, as set out in Paragraph 9 above. The Court has considered what would have been an appropriate investment for such Fund, fair to the Bank and fair to the beneficiaries. The Court, having considered the evidence, finds as a fact that it would have been reasonable for the Trustee to have invested said fund in 1-year

Treasury Bills. The Bank is, therefore, required to recalculate each quarterly statement by calculating income on the difference between the purchase price and the sales price of each imprudent security from the date of the sale to the end of the fiscal year in which the sale took place, at the 1-year Treasury Bill rate in effect at the beginning of such fiscal year; and, thereafter, for each fiscal year at the 1-year Treasury Bill rate in effect at the beginning of such fiscal year. Each of these rates is set out in Paragraph 15 below.

Such additional income would and should have been received by the Bank during each fiscal year and that income would have been additional income, available for distribution at each quarterly date. Since such distribution was not made, such income would have come under the provision of the Comptroller's Regulation 9.10, which requires the prompt reinvestment of funds awaiting distribution. The Court finds as a fact that such income awaiting distribution should have been reinvested in 1-year Treasury Bills, at the rate in effect for each such year. It is, therefore, ordered that the Defendant recalculate said quarterly statements as if all income on hand, as of November 30th of each year, had been reinvested in 1-year Treasury Bills, at the income rate in effect at such date.

The Bank is ordered and directed to forthwith pay to the Bond Fund, all of the amounts of income calculated under the foregoing Paragraph, such payment to be for the benefit of participating units in said Bond Fund. The Bank is further ordered to promptly distribute such income payment to the owners of participating units, including those participating units previously withdrawn.

11. *Adjustment of Principal, Equity Fund.* In the Order of June 24, 1981, the Court found in Paragraph 2 that the Bank had breached its fiduciary duty in the purchase of seventeen securities therein described. As a result of such breach, the

Equity Fund sustained a loss of principal in the amount of $1,173,179.03. The Bank owes the same duty in the Equity Fund as in the Bond Fund and the Bank is, therefore, ordered and directed to recalculate and restate the quarterly valuations of the Equity Fund since December 1, 1971, as if the imprudent purchases had not been made. The principal of the Equity Fund should thus be restated as if the principal amount invested in such imprudent securities were held in cash instead of the securities found to be imprudent. As of the date of sale of each of said imprudent securities, a certain amount was converted into cash and thereafter invested by the Bank. To reconstitute the fund as if such imprudent purchases had not been made, it is necessary for the Bank to replenish the principal of the Equity Fund as of the date of each such sale by paying into the principal account of the Equity Fund, the difference between the purchase price of each of such seventeen securities and the sales price thereof. Thereby the principal of the Equity Fund will be restated the same as if such securities had not been either purchased or sold. The Bank is ordered to forthwith pay to the Equity Fund the said sum of $1,173,179.03. The Bank is further ordered to recalculate and restate each quarterly valuation of principal as if such securities had neither been purchased nor sold. The Bank is further ordered to promptly distribute to the owners of the participating units, including those participating units previously withdrawn, any principal amounts due on the basis of such restated quarterly statements.

12. *Adjustment of Income, Equity Fund.* As in the case of the Bond Fund, distributions were made from the Equity Fund which included dividends received by the Bank from the stocks imprudently purchased, down to the date of the sale of each of such securities. The Court does not consider it necessary to make any adjustment of such income down to the date of sale. As each such imprudent security was sold, the Bank recovered a portion of the principal expended in purchase and it is assumed

invested such proceeds in prudent securities. The Court, therefore, finds no loss of income except on the actual loss of principal, that is, the difference between the purchase price and the sales price of each of such imprudent securities. The participating units in the Equity Fund are entitled to receive income which should have been earned on the principal which was lost and the Court orders and directs the Bank to recalculate and restore such income to the Equity Fund and to the participating units therein, as was directed in connection with income in the Bond Fund in Paragraph 10 above. The Bank is ordered and directed to forthwith pay to the Equity Fund, all of the amounts of income calculated under the foregoing Paragraph, such payment to be for the benefit of participating units in said Equity Fund. The Bank is further ordered to promptly distribute such income payment to the owners of participating units, including those participating units previously withdrawn.

13. In the Order of June 24, 1981, the Court found in Paragraph 14 thereof that the Bank had breached its fiduciary duty in the sale of five securities described therein. The plaintiffs have argued that the Bank should be required to account to the Equity Fund for the difference between the price realized from the sale of the five common stocks and the highest market price for the stocks prior to the trial of this case. While authority exists for such an approach, the Court finds that in equity and fairness, the Bank should be and hereby is ordered and directed to pay into the Equity Fund the sum of $253,175.85, the same representing the difference between the purchase price and the sales price for the five securities. The Bank is ordered and directed to treat and pay the loss of principal relating to said five securities in the same manner as is provided in Paragraph 11 for the seventeen securities found to have been imprudently purchased.

14. As to the income which should have been earned on the five securities described in 13 above, the Bank is ordered and

directed to treat and to pay such income as is provided in Paragraph 10 relating to the Bond Fund.

15. In considering what rate of return is appropriate to be used, the Court has considered a number of possibilities, including rates of return on prime commercial paper, federal fund rates, and rates on United States Government Securities. The Court, having considered the evidence, finds that the appropriate rate to be used by the Bank in calculating the income which should have been earned, is the 1-year Treasury Bill rate in effect at the beginning of each fiscal year. The rates to be used by the Bank for each fiscal year shall be as follows:

Fiscal Year Beginning December 1	Rate
1973	7.56%
1974	6.79%
1975	6.16%
1976	4.64%
1977	6.52%
1978	9.44%
1979	10.92%
1980	13.23%

16. The Bank has asserted as special defenses, laches and the Statute of Limitations. It is undisputed that throughout the entire period, and until today, the Bank is acting as sole Trustee of an express trust. Inherent in an express trust is the idea that the beneficiaries repose trust and confidence in the Trustee and in its faithful performance of duty. By these defenses, the Bank, in effect, says that the Plaintiffs were wrong in reposing such confidence in it and that the Plaintiffs should sooner have taken formal legal action against the Bank. In the opinion of the

Court, this position of the Bank is not well taken. The Bank has submitted no sufficient evidence of prior knowledge by the beneficiaries of breach of trust or any delay in taking proper action for relief.

The doctrine of laches is well set out in *Multer* v. *Multer,* 280 Ala. 458, at 461, 195 So. 2d 105:

> "The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief. 'Laches' has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar in equity."

The fact that the Plaintiffs relied on the Bank to faithfully perform its fiduciary duties does not constitute a neglect or omission to assert a right. The Bank has not shown that lapse of time or other circumstances caused any prejudice to the Bank. There has been no death of a material witness; no facts have become obscure because of delay. The Bank produced testimony of the individual employee responsible for the purchases and sales in question. The defense of laches has not been proven.

Nor can the Bank avail itself of the defense of Statute of Limiations. This is not a tort action where damages are sought at law for negligence. This is a proceeding in equity to enforce the fiduciary duties of the Trustee of an express trust. It is firmly established that so long as there has been no denial or repudiation of the trust, the Statute of Limitations does not run in favor of a Trustee of an express trust. 76 Am. Jur. 2d, p. 794, *Trusts,* Sec. 587. This has long been the law in Alabama. *Benners* v. *First National Bank of Birmingham,* 247 Ala. 74, 79; 22

So. 2d 435, and cases cited; *McCarthy* v. *McCarthy*, 74 Ala. 546. The defense of Statute of Limitations is not available to the Bank in this case.

17. The Bank contends that certain members of the Plaintiff classes are barred from participation in the restoration of losses to the common funds by virtue of having executed releases. The Bank argues that the amount to be restored to the common funds should be reduced by the amounts otherwise allocable to individual trusts in which a release was given. Under Alabama law, releases must be construed according to the intent of the parties, Code 12-21-109. The releases in this case are in evidence. The releases run from the individual trust beneficiaries to the Bank in its capacity as Trustee of the several individual trusts and do not purport to release the Bank in its separate capacity as Trustee under the Bond Fund and Equity Fund. There is nothing contained in the releases to suggest any intent to release the Bank of potential claims for breach of its fiduciary duty in its capacity as Trustee of the common funds. Moreover, the releases are predicated upon the recital that the Bank, as Trustee of the several individual trusts, has delivered to the beneficiaries thereof the full amount due. Since the value of the participating units in the common funds held by the individual trusts will be increased under this Judgment, this recital has proven to be factually erroneous and, therefore, represents a material mutual mistake of fact. The Court is of the opinion and finds that the releases are not a defense and that the obligation of the Bank to restore the losses to the common funds as set forth above, is not to be diminished or reduced because of the releases.

18. Nothing in this Decree shall be construed as an adjudication of any right or liability as to any payment made to any trust or interest retiring from either the Bond Fund or the Equity Fund which, by such recalculation, might be considered to be an overpayment by the Trustee to the retiring beneficial interest.

19. The Court has considered whether it is necessary to appoint a Special Master or Referee to supervise compliance with this Decree. The Court is of the opinion that such action is not necessary at this time. The spirit of this Decree is plain, that the Class Plaintiffs be put in the same position they would have occupied except for the breaches of fiduciary duty. The letter of this Decree is equally plain, that the Defendant perform such acts as are necessary to put the Class Plaintiffs in that position. The Court recognizes that this Decree requires the Defendant to make numerous recalculations of Quarterly Statements. The Court heard the oral testimony of the witness, Crane, which testimony showed that the Defendant had already had its computers perform numerous recalculations of the type required by this Decree. The Court, therefore, does not feel that the Defendant will have any difficulty in understanding and implementing this Decree. However, should the Defendant require assistance or guidance in complying with this Decree, the Court will consider an application by either party to appoint a Referee or Special Master to supervise such performance.

20. The costs incurred in this matter are hereby taxed against the Defendant, First Alabama Bank of Montgomery, N.A., for which let execution issue. By separate Order, the Court will set down for hearing a determination of what items are to be taxed as costs, including Plaintiffs' claim that Plaintiffs' attorneys' fees should be so taxed.

DONE this the 19th day of August, 1981.

/s/ Perry O. Hooper
CIRCUIT JUDGE

APPENDIX F

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civii Action No.
CV-78-1491-H

Charlotte kyle Martin,
Kathleen Gerson, et al.,
Plaintiffs,

vs.

First Alabama Bank Of
Montgomery, N.A.,
Defendant.

ORDER

Pursuant to the Pre-Trial Order entered in this cause on May 12, 1981, the Court with an advisory jury, pursuant to Rule 39(c) of the Alabama Rules of Civil Procedure, commenced the trial of the issue of whether the defendant's acquisition and/or sale of certain securities scheduled in Exhibit "A" in the Pre-Trial Order measured up to the standards required of a paid trustee. Upon consideration of the evidence adduced at such trial, the Court makes the following findings of fact and conclusions of law:

1. The defendant as trustee of the Common Bond Fund purchased the following debentures, viz: ATICO Mortgage Investors, Barnett Mortgage Trust, Guardian Mortgage Investors, Justice Mortgage Investors, Midland Mortgage Investors, and Security Mortgage Investors. The Court is of the opinion and finds that the purchase of such securities by the defendant as

such trustee did not measure up to the standards required of it. Having concluded that the purchases of said securities were imprudent, it is not necessary for the Court to decide the issue of whether the subsequent sale of the same was prudent or imprudent.

2. The defendant as trustee of the Common Equity Fund purchased stock of the following companies as investment in the Common Equity Fund, viz: American Garden Products, Ames Department Stores, Beverage Canners, CNA, Elixir, First Mortgage Investors, Hav-A-Tampa, Kenney Services, Loomis Corporation, Mortgage Associates, Transamerica, Universal Oil Products, Wynn Oil, Associated Coca-Cola Bottling Company, Cox Broadcasting, Rust Craft Greeting Cards, and Sealed Power. The Court is of the opinion and finds that the purchase of such securities by the defendant as such trustee did not measure up to the standards required of it. Having concluded that the purchases of said securities were imprudent, it is not necessary for the Court to decide the issue of whether the subsequent sale of the same was prudent or imprudent.

3. The Court finds that the purchase by the bank as trustee of the Common Equity Fund of the following securities measured up to the standards required of a paid trustee, viz: Allied Chemicals, Amfac, Inc., Blue Bell, Inc., Green Giant, Pabst Brewing Company, Purolator, Inc., and Syntex.

4. The Court is of the opinion and finds that the sale by the defendant as trustee of the Common Equity Fund of the following securities did not measure up to the standards required of a paid trustee, viz: Allied Chemicals, Amfac, Inc., Blue Bell, Inc., Pabst Brewing Company, and Purolator, Inc.

5. In reaching the conclusions and findings set forth above, the Court has applied the standards adopted by the Supreme Court of Alabama and set forth by it in the case of *Birmingham Trust National Bank* v. *Henley,* 371 So. 2d 883.

6. The trial of all remaining issues in this case shall be conducted by the Court without a jury to commence as set forth in a separate order entered on this date.

DONE this the 24th day of June, 1981.

/s/ PERRY O. HOOPER,
Circuit Judge

APPENDIX G

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action No.
CV-78-1491-H

Charlotte Kyle Martin
and Kathleen Gerson,
et al.,
Plaintiffs,

v.

First Alabama Bank Of
Montgomery, N.A., a
National Banking Corpor-
ation,
Defendant

ORDER ON CLASS ACTION DETERMINATION

This cause came on regularly to be heard before the undersigned Circuit Judge on July 3, 1979, upon the Plaintiffs' Motion for Class Action Determination and upon the Defendant's Motion to Dismiss the aspect of the case which seeks to maintain the suit as a Class Action, or in the alternative for partial summary judgment on said aspect. Parties were present in court and by counsel.

The Court having considered the evidence presented and having heard argument of counsel and having considered briefs, makes the following findings of fact. In connection with these findings, the Court takes, as it must, the allegations of the complaint as true. Whether or not plaintiffs will ultimately prevail on such allegations is not, of course, before the Court on this

class action determination, and is not here decided. The Court finds as follows:

1. The Defendant First Alabama Bank of Montgomery, N.A. maintains two Discretionary Common Trust Funds, known as the "Bond Fund" and the "Equity Fund", of which the Bank is the sole trustee, and into which funds of individual trusts are deposited for investment. Only individual trusts of which the Bank is trustee or co-trustee may purchase participating units in the Common Trust Funds.

2. The funds of more than 1200 trusts have been invested in units of the two common trust funds during the period covered by the suit. Each of such participants potentially has the same claim as the named plaintiffs, and would have been affected by the investment decisions of the Bank in its role as trustee of the common funds. The class is thus so numerous as to make joinder of all members impracticable, and the requirement of Rule 23 (a)(1), *A.R.C.P.*, is therefore clearly met.

3. The Plaintiffs' complaint charges the Defendant with breach of its duty as trustee in making certain investments with the funds of the common bond and equity funds, which Plaintiffs allege resulted in losses to those funds. Plaintiffs seek to compel Defendant to restore those losses. The factual questions concerning Defendant's conduct as trustee of the common funds and the legal questions of its liability to restore any losses, or other relief, are common to all members of the class. The complaint does not make a claim for any breach of trust duties by the Bank in its other capacity as trustee or co-trustee of the individual trusts which held participating units in the common funds, or of individual trusts which did not hold any such participating units. Whether or not any trust beneficiary has any complaint or cause of action for individual investment decisions of the Bank acting in another capacity is not now before this Court in this suit.

The Rule 23(a)(2) requirement that there be questions of law or fact common to the class is met. Although, for purposes of rule 23 (a)(2), such questions need not predominate, *Vernon J. Rockler Co.* v. *Graphic Enterprises, Inc.*, 52 F.R.D. 335, (D. Minn, 1971) they would seem to be predominant here, except for individual allocation of damages in the event of a recovery by plaintiffs. Such individual damage questions do not defeat class treatment, *Esplin* v. *Hirshi*, 402 F. 2d 94 (10th Cir., 1968).

4. Plaintiffs are all beneficiaries of trusts which hold or held participating units in the common funds. It is clear that if any investment or investments in these funds were ultimately determined to have been made in breach of Defendant's duty of prudence and due care, such finding would apply to all affected participating units, not to Plaintiffs alone. The plan of the Discretionary Common Trust Funds, in evidence herein, requires that all units be identical and that they be in all respects treated the same. The named Plaintiffs represent trusts which have or do participate in one or both such funds, and have held units throughout the period covered by the suit. Their claims are typical of the claims of the class, Rule 23 (a)(3), *A.R.C.P.*

5. Plaintiffs are represented by two Montgomery law firms and one Birmingham firm all with experience in class actions and other litigation. Plaintiffs in their several depositions, and in their conduct of this litigation to date have clearly evidenced their determination to pursue these claims to a conclusion. These class plaintiffs have no conflicts with the unnamed class members which would prevent their vigorous representation of the class. The Court finds that the named Plaintiffs fairly and adequately represent the class here, Rule 23(a)(4), *A.R.C.P.*

Having determined that the Plaintiffs meet the four requirements of Rule 23 (a), the Court proceeds to consider whether the action is to be maintained as a class action under Rule 23(b).

The Court has considered the alternatives to a class action. There appears to be no feasible, practicable such alternative. Unquestionably, individual suits by each of the numerous individual Trusts seeking to rectify the wrong common to all of them would result in a multiplicity of actions and be contrary to the spirit of the rules, and particularly the remedy sought to be reached by Rule 23. Prosecution of such separate actions would create a risk of inconsistent and varying adjudications, while an adjudication with respect to one individual member of the class in this action would, as a practical matter, be dispositive of the interests of all other persons similarly situated.

The Court has considered whether this action should be maintained as a class action under Rule 23 (b)(1), (b)(2), or (b) (3). The authorities hold that when there is a choice between class action under Rule (b)(1) or (b)(2) on the one hand and (b)(3) on the other, the Court should order that the suit be maintained as a class action under Rule (b)(1) or (b)(2) rather than under (b)(3), *Berman* v. *Narrangannsett Racing Assn.*, 48 F.R.D. 333 (D.R.I., 1969); *Van Gemert* v. *Boeing, Co.*, 259 F. Supp. 125, (S.D., N.Y., 1966).

The reasons for prefering classification under Rule 23 (b)(1) or (b)(2) over (b)(3) are both practical and legal. If the action is classified as a Rule 23 (b)(3) action, members of the class may elect not to be included and thereby will not be bound by the judgment, while a judgment under rule 23 (b)(1) or (b)(2) binds everyone in the class. No one may opt out and bring a second suit to relitigate the same issues or claims, *Berman* v. *Narragannsett Racing Assn. supra.* The Court further finds:

6. Rules 23 (b)(1)(A) and (B) provide that class action treatment is appropriate where:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests:

Here, the complaint sets up a claim for the trustee to restore funds to the common trust funds, based on allegations that the trustee made certain imprudent investments in breach of its duties as trustee of the common funds. An adjudication either that the trustee did breach its duty in management of the common funds or that it did not, would, as a practical matter, and perhaps as a legal matter, be depositive of the interests of other trusts holding participating units in the funds, and would substantially impair the ability of absent class members to protect their interests. If a suit by one plaintiff established a breach of duty as to one or more common fund investments and a right to have the funds restored, while a suit by another plaintiff resulted in a finding of no breach of duty, the Bank, as the party opposing the class, could not act in a consistent way with reference to the separate adjudications.

While the two provisions are stated the alternative in the Rule, the Court finds that the criteria of both Rule 23 (b)(1)(A) and 23 (b)(1)(B) are met.

7. Plaintiffs also seek a declaration that Defendant is to account to the common funds for certain alleged losses which are averred to have been the result of imprudent trust management. Plaintiffs then seek restoration of the sums so accounted. The Bank as trustee of the common funds, has maintained that it

owes no duty of such accounting or restoration, to the named Plaintiffs or to others holding participating units.

A declaration such as Plaintiffs seek would affect the class as a whole, and would direct uniform conduct on the part of Defendant with respect to the class as a whole. The Court therefore additionally finds, as a separate alternative in addition to the findings of paragraph 6 above, that the criteria of rule 23 (b)(2) are met.

Based on the foregoing findings of fact, the Court concludes:

(A) Plaintiffs have met the requirements of Rule 23 (a)(1)-(4) *A.R.C.P.* in that:

1. The class is so numerous that joinder of all members is impracticable;

2. There are questions of law or fact common to the class;

3. The claims of the representative Plaintiffs are typical of the claims of the class; and

4. The representative Plaintiffs will fairly and adequately protect the interests of the class.

(B) Plaintiffs have further met the requirements of Rule 23(b)(1)(A), *A.R.C.P.* in that the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish imcompatible standards of conduct for the defendant Bank (the party opposing the class).

(C) Plaintiffs have also met the criteria of Rule 23 (b)(1)(B), *A.R.C.P.* in that the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which

would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

(D) Plaintiffs also have met the requirements of Rule 23 (b)(2) in that the Bank has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole.

(E) The Court, having fully considered the matters, is of the opinion and finds that this action should be maintained and should proceed as a class action, separately and severally under Rules 23(b)(1)(A), 23(b)(1)(B) and/or 23(b)(2), *A.R.C.P.* on behalf of two classes:

(1) A class comprised of Plaintiffs and all others similarly situated, a portion of whose funds were invested by the Defendant as Trustee, in the Common Trust Fund of the Defendant, known as the "Bond Fund", during the period alleged in the complaint, as amended.

(2) A class comprised of Plaintiffs and all others similarly situated, a portion of whose funds were invested by the Defendant as Trustee in the Common Trust Fund of the Defendant, known as the "Equity Fund", during the period alleged in the complaint, as amended.

(F) Defendant's motion to dismiss the complaint as last amended and the class action aspect of it, is due to be hereby is DENIED.

(G) Defendant's motion for partial summary judgment on the class action aspect of Plaintiff's complaint is also due to be and hereby is DENIED.

(H) The stay of discovery on the merits of Plaintiffs' claim heretofore entered is hereby lifted and terminated.

(I) All other matters are reserved.

Done and ordered this 26th day of July, 1979.

/s/ Perry O. Hooper
Circuit Judge

APPENDIX H

RULE 23, ALABAMA RULES OF CIVIL PROCEDURE

Rule 23

Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(dc) District Court Rule. Rule 23 does not apply in the district courts.